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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 293.

CARL U. ACKERLIND, ADMINISTRATOR OF ERIK G. LIND, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED NOVEMBER 28, 1914.

(24,451)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 9, 1915.

1 In the Court of Claims.

No. 29161.

ERIK G. LIND, Doing Business under the Name and Style of Lind & Company,
v.
THE UNITED STATES.

I. *Amended Petition.*

Filed December 24, 1910.

Original Petition Filed May 17, 1906.

To the Honorable the Court of Claims:

The claimant, Erik G. Lind, respectfully represents:

I. The Chief of the Bureau of Equipment of the Navy Department advertised for bids to be opened on the seventeenth day of January, 1905, for coal to be carried to Manila Bay in the Philippine Islands. The claimant submitted a bid, making said bid in the name of Lind & Company, offering to deliver ten thousand tons of coal at Manila Bay as designated for the price of four dollars and eighty-eight cents ($4.88) a ton and twenty thousand tons for the price of four dollars and ninety-two cents ($4.92) a ton. The needs of the Navy Department for transportation of not less than sixty thousand tons of coal to that place were urgent and, after accepting the bid of a lower bidder, the Chief of the Bureau of Equipment asked of the claimant whether he would deliver thirty thousand tons of coal as aforesaid for the price of four dollars and eighty-seven and one-half cents ($4.87½) a ton, and if so, how quickly.

II. The claimant visited the Navy Department in person and exhibited to the Chief of the Bureau of Equipment his facili-
2 ties for delivering coal with unusual promptness, but told the Chief of said Bureau that if he should undertake to deliver coal as aforesaid at the price named and with unusual promptness and despatch, it would be necessary for him to be relieved of a certain provision contained in the proposal as offered by the Navy Department as follows, to wit:

"And further, that in the event of a cargo arriving before the preceding cargo is discharged twenty-four hours' notice of arrival shall be given after discharge of each cargo before lay days commence in case of that next arriving."

The claimant said to the Chief of the Bureau of Equipment that it would be impossible, if he used all possible despatch, to guarantee that the vessels would arrive at such particular times as would permit each cargo to be discharged prior to the arrival of each subsequent vessel; that he could not make a contract whereby any loss

arising from such conditions should fall upon him, but that he stood prepared to guarantee the promptest possible delivery of the coal at the price named aforesaid, being less than his own proposal therefor, if the above stated clause should be eliminated from the contract when made.

III. Thereupon the Chief of the Bureau of Equipment, acting on behalf of the Secretary of the Navy, agreed with the claimant that in making a contract whereby the prompt facilities of the claimant should be given to the United States at the price aforesaid, such clause should be eliminated. In making such an agreement the Chief of the Bureau of Equipment acted on behalf and with the authority of the Secretary of the Navy, as provided by Section 420 of the Revised Statutes as follows:

"All of the duties of the Bureaus shall be performed under the authority of the Secretary of the Navy, and their orders
3 shall be considered as emanating from him, and shall have full force and effect as such."

IV. Under the practice prevailing in the Navy Department, after the details of contracts are arranged in the Bureau of Equipment or elsewhere, the contract itself is prepared in the Bureau of Supplies and Accounts. The Chief of the Bureau of Equipment in making requisition for such contract upon the Chief of the Bureau of Supplies and Accounts, by a mistake on the part of the clerk drawing the contract, said mistake not being observed or known by the Chief of the Bureau of Equipment, failed to notify the Chief of the Bureau of Supplies and Accounts that said clause was to be omitted from the contract in accordance with the understanding and arrangement with the claimant. A contract was thereupon drawn up in the Bureau of Supplies and Accounts and transmitted by the Chief of said Bureau to Pay Director Lawrence G. Boggs, U. S. N., purchasing paymaster at the Navy Pay Office at New York, with instructions that he was to enter into the same on behalf of the United States with the claimant. The Chief of the Bureau of Supplies and Accounts had no knowledge of the understanding and agreement between the Chief of the Bureau of Equipment and the claimant and followed the mistake made by the clerk aforesaid in the latter Bureau. Had such understanding and agreement been known to the Chief of the Bureau of Supplies and Accounts, the contract would have been in accordance therewith.

V. The claimant relied upon his understanding had with the Chief of the Bureau of Equipment and believed that the contract as drawn up would be, and was, without the clause aforesaid. He thereupon signed said contract without reading it and without ever observing that it contained any such provision.

4 Said contract was also signed by said purchasing paymaster on behalf of the United States without knowledge of said understanding. A copy of said contract, the date thereof being March 2, 1905, is appended to this petition and marked "Exhibit A."

VI. Immediately upon signing the contract he took steps to carry it out and with all due diligence caused to report to various ports in

the United States, as provided by said contract, for cargo under said contract, the following steamers upon the dates named:

March 3, 1905, The Knight of St. George, at Lambert's Point, Va.
March 17, 1905, The Coronation, at Newport News, Va.
March 23, 1905, The Selsdon, at Lambert's Point, Va.
April 13, 1905, The Croydon, at Philadelphia, Pa.
May 1, 1905, The Kalibia, at Newport News, Va.
May 6, 1905, The Kelvinbank, at Philadelphia, Pa.
May 17, 1905, The Fitzclarence, at Newport News, Va.
July 10, 1905, The Needles, at Philadelphia, Pa.

VII. The said steamships, when loaded, sailed for, and arrived at Cavite on the following dates:

	Sailed.	Arrived.
Knight of St. George	March 10	May 23
Coronation	March 22	May 31
Selsdon	March 28	May 26
Croydon	April 18	June 16
Kalibia	May 4	July 17
Kelvinbank	May 18	July 18
Fitzclarence	May 24	August 4

VIII. The claimant, upon the seventeenth day of June, 1905, first received notice by cable from Manila that the officers of the Navy Department there were enforcing against his vessels there and then unloading, the provision above cited from the contract which he believed to have been omitted. He thereupon made protest to the Navy Department and was surprised to find that the paragraph in question was in the contract. Upon calling the attention of the Chief of the Bureau of Equipment to that fact, it was immediately declared by him to be an error and he at once communicated with the Chief of the Bureau of Supplies and Accounts and requested that said clause be omitted as it properly had no place in said contract.

IX. The Chief of the Bureau of Supplies and Accounts acknowledged the mistake and thereupon notified Pay Director Lawrence G. Boggs, U. S. N., to correct the contract as requested. In accordance with the notice so received, said Boggs on the twenty-third day of June, 1905, wrote the following letter to the claimant:

"NEW YORK, June 23, 1905.

"GENTLEMEN: Referring to the Navy Pay Office contract No. 227, dated March 2, 1905, based on Bureau requisition No. 204, Equipment:

"1. By direction of the Bureau of Supplies and Accounts, paragraph 7 of said contract is hereby amended by the omission of the last clause, reading as follows:

"'And further that, in the event of a cargo arriving before the preceding cargo is discharged, 24 hours' notice of arrival shall be given, after discharge of each cargo, before lay days commence in case of that next arriving.'

"2. Please acknowledge receipt of this letter, as to whether or not the amendment as above is satisfactory to you.

Respectfully,

"L. G. BOGGS,
"Pay Director, U. S. N.

"Messrs. Lind & Company, No. 1 Broadway, New York."

The claimant accepted such amendment as satisfactory. The claimant believed that by reason of this action, said provision would not be enforced against him.

6 X. Claims for demurrage based upon said contract, according to its true intent as expressed when so amended, were presented by the masters of said vessels to the commandant at Cavite and thereafter by the claimant to the Navy Department. They were approved by the Chief of the Bureau of Equipment and by the Auditor for the Navy Department. Upon appealing to the Comptroller of the Treasury in regard to other matters relating to payments under said contract, the Comptroller reversed the decision of the Auditor in regard to the clause hereinbefore referred to and declared that the same must be enforced against the claimant. By reason of such decision, various claims based upon the vessels aforesaid were disallowed and payment refused to the claimant for the amounts due him by reason of the facts hereinbefore set forth.

In making calculation of the demurrage upon the several vessels, besides the failure to recognize the error in the contract as heretofore set forth, various mistakes, both of fact and law, and miscalculations were made by the accounting officers of the Treasury to the prejudice of the claimant, whereby claims for demurrage remain due to him. All the claims for demurrage accruing to claimant under said contract are set forth in detail in Exhibit C annexed to this petition.

XI. By the contract aforesaid it is provided: "All expenses of loading to be borne by the contractors; the government discharges cargo at its expense." Notwithstanding said provision, the representatives of the United States engaged in the discharge of cargoes of said vessels, called upon the captains of said vessels to furnish assistance to them in the discharge of the cargoes, using therefor the crew of said vessels, the hoisting engines, winches, gear and other apparatus upon said vessels and consuming coal and oil then upon

7 the said vessels, and being then and there the property of the claimant for all purposes of this contract.

The claimant's representatives, the masters of said vessels, permitted the use of the engines and other appliances and coal and oil aforesaid, for the convenience of the United States, expecting that the United States in accordance with the contract would recompense the claimant therefor.

In like manner the discharge of the vessel required payment to men engaged upon the vessel, all of which is properly chargeable to the United States under the contract.

XII. By the terms of the contract aforesaid, and under section 15

of the act of March 3, 1905, 33 Stat. L. 976, these vessels being under sole contract with the United States, engaged in carrying supplies for the United States Navy Department, and therefore employed in the service of the United States, were to be admitted free of tonnage, customs and other duties into the port of Manila. On arrival of said vessels respectively there, the Philippine authorities, appointed under authority of the laws of the United States, charged duties, tonnage and customs duties, which were paid by the claimant through the masters of said vessels, and the claimant avers that said expenses, under the contract, were to be borne by the United States and that the charge thereof was a breach of the obligations of the United States under said contract.

XIII. On the third day of July, 1905, another contract was made between the United States, acting by Pay Director Lawrence G. Boggs, U. S. N., purchasing officer, Navy Pay Office, NewYork, and the claimant, for the transportation of about 10,000 tons of coal from the United States to the Philippine Islands. A copy of
8 said contract is annexed to this petition and marked "Exhibit B."

One of the vessels in which said coal was to be shipped was the Needles. Upon the arrival of said vessel at Manila, the discharge of her cargo, for which the United States was responsible, consumed a period beyond the lay days allowed by said contract. A claim was made for demurrage due to the claimant, and the same was allowed by the Navy Department, but owing to a miscalculation and a misconstruction of the contract, it was disallowed by the Auditor for the Navy Department.

The representatives of the United States also used coal belonging to this vessel, then and there the property of the claimant for the purposes of this contract, in the manner set forth in paragraph XII. The customs authorities of the Philippine Islands also charged tonnage dues and other customs charges to the claimant on account of said vessel in the manner set forth in paragraph XII hereof.

XIV. Claims on account of the value of materials and services of the crews of the vessels as set forth in paragraphs XI and XIII and for port dues and other customs charges exacted as set forth in paragraphs XII and XIII were presented by the masters of the several vessels on behalf of the claimant to the Commandant at the Naval Station at Cavite, and subsequently by the claimant to the Navy Department and by the Navy Department referred to the Auditor for the Navy Department. All of said claims were finally disallowed either by the Auditor or by the Comptroller of the Treasury.

XV. By reason of the foregoing facts a claim has accrued to this claimant for the amount of $11,032.40, the particulars of
9 which are more fully stated in "Exhibit C" to this petition.

No assignment or transfer of this claim has been made, and the claimant is the owner thereof. The amount as claimed is justly due after allowing all due credits and offsets.

And the claimant prays:

(1) That this court enter a decree for the reformation of said contract of March 12, 1905, by declaring that its true intent and

purpose is in the omission of the clause above set forth and by ordering the omission thereof;

(2) And that the court thereafter enter judgment in the claimant's favor in the sum of eleven thousand thirty-two dollars and forty cents ($11,032.40) as more in detail appears in "Exhibit C" hereof.

KING & KING,
Attorneys for Claimant.

DISTRICT OF COLUMBIA, *ss:*

William B. King, being duly sworn, deposes and says: I am one of the attorneys for the claimant in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge and belief.

WILLIAM B. KING.

Subscribed and sworn to before me this 23d day of December, 1910.

[SEAL.] MARIE A. SEARLES,
Notary Public.

10 EXHIBIT A.

Contract of March 2, 1905, already printed, Record, page 31. Omitted by stipulation.

EXHIBIT B.

Navy Pay Office Contract.

S. and A. Form No. 235.—To be used when the consideration exceeds five hundred dollars and the time allowed for delivery is not over thirty days.

Contract No. 48.
Series 1906.
Pay Office, New York.

Account of { Req. No. 20, Bu. Equipment.
Station, Bureau.
App'n, Coal & Trans., 1906.

This contract, of two parts, made and concluded this third day of July, A. D. 1905, by and between Lind & Co., of 1 Broadway
11 New York, in the State of New York, party of the first part and the United States, by purchasing pay officer, United States Navy Pay Office, New York, N. Y., acting under the direction of the Secretary of the Navy, party of the second part, witnesseth that, for and in consideration of the payments hereinafter specified the party of the first part, for themselves and their personal and legal representatives, doth hereby covenant and agree to and with the party of the second part, as follows, viz:

That they, the said party of the first part, will furnish and deliver

at their own risk and expense, at such place as specified below, and within specified days from the date of this contract, the following articles, and at the price set opposite each item, respectively:

Requisition No. 20, Bu. Bureau of Equipment.

For Naval Service.

1. Transportation of about 10,000 tons (10% more or less) bituminous coal, one cargo from Philadelphia, Pa., and one from Newport News, Va., to the U. S. Naval Coal Depot, Sangley Point, Manila Bay, P. I., at per ton, $4.00.

2. Shipments to be made in the British steamer Needles (net registered tonnage, 2,995 tons), to load at Philadelphia early in July, 1905, and the British steamer Baron Cawdor (net registered tonnage, 2,770 tons), to load at Newport News, Va., during the month of August, 1905.

3. Each steamer to be consigned for loading to the contractor for supplying the coal at the places named above, and upon reporting for cargo to take turn in loading, it being understood that Government dispatch will be accorded. When loaded to sail immediately for Cavite, and upon arrival to report to the commandant and be subject to his orders in the matter of discharge.

4. All expenses of loading to be borne by the ships, the Government agreeing to discharge at its expense.

5. The Government guarantees but twenty (20) feet of water at coaling wharf, Sangley Point.

6. Each cargo to be discharged at the rate of four hundred (400) tons per day for such part of cargo as may be necessary to discharge in the bay to enable vessel of deep draft to go to wharf, and six hundred (600) tons per day at wharf. Sundays and legal holidays excepted in each instance, or the Government pays demurrage at the rate of eight (8) cents per ton per day on the net registered tonnage of the vessel for any detention caused by the Government (through fault of its own) not discharging at the above-named rate, it being understood that twenty-four (24) hours' notice of arrival shall be given in each case before lay days commence.

7. Each cargo to be delivered in good condition alongside the wharf or alongside any vessel or lighter where the carrier can safely lie afloat, as may be directed by the commandant.

8. Freight to be paid for the number of tons certified to have been received from each ship, by vouchers prepared at the Department on receipt of advice from the commandant of discharge; but under no circumstances shall payment be made on any quantity in excess of the bill of lading weight.

12 9. If, upon discharge of a cargo, the quantity discharged should fall short 1 per cent or less from the bill of lading weight, such shortage will be disregarded and payment made on bill of lading weight. If, however, the shortage exceed 1 per cent, such excess shall be paid for by the contractors at the rate per ton for

bunker coal at point of loading, the amount to be deducted before payment is made for freight.

10. Any question of demurrage to be settled at Washington.

11. There will be no wharf charges at Sangley Point.

12. While an average daily discharge of four hundred (400) tons in the stream and six hundred (600) tons at the wharf is guaranteed, the commandant will be instructed to discharge the cargo as expeditiously as practicable with a view of exceeding these rates without working overtime.

It is hereby mutually and expressly covenanted and agreed by and between the parties hereto that the article or articles to be furnished or services to be performed under this contract shall conform in all respects to the requirements of the specifications hereunto annexed, which specifications, the "Conditions," and the "Instructions," printed on the proposal of the party of the first part, shall be deemed and taken as forming a part of this contract with the like operation and effect as if the same were incorporated herein; and said article, articles, or services shall, upon delivery or completion, be subject to inspection and examination by the officer or officers authorized by the party of the second part to inspect and examine the same; and no article furnished or services performed under this contract shall be accepted until it or they shall have been inspected and approved by such officer or officers; and any of said articles not so approved shall be removed by the party of the first part at their own expense, and within ten days after notification.

It is further covenanted and agreed, as aforesaid, that if the party of the first part shall fail to deliver any or all of the articles or materials or to perform any or all of the services herein contracted for, in conformity with the conditions and requirements of this contract, the party of the second part shall make deductions as follows from the contract price of all supplies not satisfactorily delivered or services not satisfactorily performed by the last day of the time fixed therefor by this contract, viz:

Up to and including ten thousand dollars ($10,000) in value at contract prices, at the rate of one-tenth of one per cent, and above ten thousand dollars ($10,000) at the rate of one-twentieth of one per cent for each day's delay until satisfactory delivery or performance shall have been made, or until such time as the party of the second part may procure the same as hereinafter provided; rejection of deliveries or performance not to be considered as waiving deductions. In case the deductions to be made hereunder should equal three per cent of the stipulated value of the articles or materials not so delivered or services not so performed, this contract may, at the option of the Bureau of Supplies and Accounts, be canceled and the party of the first part barred from competition for future contracts: Provided, That delays on account of which deductions may be made or this contract canceled, as herein stated, caused by strikes, riots, fire, or other disaster, or delays in transit or delivery on the part of
13 transportation companies, or when no damage or inconvenience has been suffered by the Government, may, in the

discretion of the Bureau of Supplies and Accounts, be accepted as sufficient cause for waiving such deductions or cancellation.

It is, however, further covenanted and agreed, as aforesaid, that the party of the second part may, in case *he* should so elect, purchase in open market, or by contract with some other person, such of said articles or materials, or procure the performance of such services, as the party of the first part shall fail to deliver or perform as required, and may demand and recover from the said party of the first part the difference between the price so paid therefor and the price herein stipulated; and the party of the first part hereby bind themselves and their representatives aforesaid to pay the amount of such difference to the party of the second part on demand, it being understood that no deductions for delays shall be made in accordance with the preceding clause hereof from the price of any article or material or service, after the same shall be delivered or performed, when purchased or procured as provided in this clause.

It is further covenanted and agreed, as aforesaid, that the said party of the first part shall indemnify the United States, and all persons acting under them, for all liability on account of any patent rights granted by the United States which may effect the adoption or use of the article herein contracted for; that no Member of or Delegate to Congress, nor any person belonging to, or employed in, the naval service, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom, except as a member of a corporation; that any transfer of this contract, or of any interest therein, to any other person or party than said party of the first part, shall annul this contract so far as the United States are concerned; that if said party of the first part shall fail in any respect to perform this contract on their part, it may, at the option of the United States, be declared null and void, without prejudice to the right of the United States to recover for defaults herein or violations hereof.

And this contract further witnesseth, that the United States, party of the second part, in consideration of the foregoing sipulations, do hereby covenant and agree, to and with the party of the first part, as follows, viz:

That upon the presentation of the customary bill, and the proper evidence of the delivery, inspection, and acceptance of the said article, articles, or services, and within ten days after the warrant shall have been passed by the Secretary of the Treasury, there shall be paid to the said Lind & Co., or to their order, by the navy paymaster for the port of New York, the sum of forty thousand dollars ($40,000) (estimated) for all the articles delivered or services performed under this contract: Provided, however, That no payments shall be made until all the articles or services shall have been delivered or performed and accepted, except at the option of the Bureau of Supplies and Accounts.

It is mutually understood and agreed, as aforesaid, that no payment or allowance to said party of the first part will or shall be made by the United States for or on account of this contract except as herein specified; that ten per cent will be withheld from the amount of each payment herein stipulated, as security for the full completion and

performance of their covenants and agreements by the said
14 party of the first part, who shall, when all the articles to be delivered or services to be performed hereunder shall have been accepted, be entitled to receive the aggregate amount of such reservations.

In witness whereof, the said parties hereto have hereunto set their hands and seals the day and year first above written.

LIND & CO. [L. S.]
A. S. GOULD. [L. S.]
L. G. BOGGS, [L. S.]
Pay Director, U. S. N., Purchasing Pay Officer,
U. S. Navy Pay Office, New York, N. Y.

Signed and sealed in the presence of—
Z. M. PICKETT,
As to Party of the First Part.
F. W. PATTERSON,
As to Purchasing Pay Officer.

15 EXHIBIT C.

Detailed Statement of Claims.

Amounts due for demurrage:

Knight of St. George	$725 10
Selsdon	2,443 43
Coronation	3,584 41
Croydon	906 15
Kalibia	366 61
Needles	229 95
Total	$8,255 65

Amounts due for use of engine and tackle, coal and other materials and services of crews:

Knight of St. George	$180 10
Selsdon	61 44
Coronation	137 40
Croydon	64 68
Kalibia	304 50
Kelvinbank	217 60
Fitzclarence	212 62
Needles	221 00
Total	$1,399 34

Amounts due for port charges and customs dues:

Knight of St. George	$188 65
Selsdon	151 57

Coronation	158 05
Croydon	159 60
Kalibia	200 46
Kelvinbank	145 44
Fitzclarence	168 32
Needles	205 32
Total	$1,377 41

Final Summary.

Demurrage claims	$8,255 65
Material claims	1,399 34
Port charges	1,377 41
Total	$11,032 40

16 II. *General Traverse.*

(Filed January 25, 1912).

In the Court of Claims of the United States.

No. 29161.

ERIK G. LIND, Doing Business under the Name and Style of Lind & Company,
v.
THE UNITED STATES.

And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney-General.

III. *Argument and Submission.*

This case was argued on the 25th day of January, 1912, and again on the 3d day of November, 1913, by Mr. William B. King for the claimant, and Mr. W. F. Norris for the defendants, and submitted.

17 IV. *Order Substituting Administrator and Reentering Judgment.*

In the Court of Claims.

No. 29161.

CARL U. ACKERLIND, Administrator of Erick G. Lind, Deceased,
v.
THE UNITED STATES.

Order.

Upon the suggestion by Carl U. Ackerlind of the death of Erik G. Lind, the claimant herein, and upon proof of the appointment of said Carl U. Ackerlind as administrator of said Erik G. Lind, it appearing in said motion that Erik G. Lind was dead on December 1, 1913, when the judgment of this court in this cause was entered, it is this 23d day of November, 1914, Ordered, Adjudged, and Decreed:

1. That said Carl U. Ackerlind be admitted to prosecute this cause as administrator aforesaid;

2. That the findings of fact and judgment of this court
18 entered upon the 1st day of December, 1913, without knowledge that said Erik G. Lind was deceased on the date thereof, be set aside and the opinion then rendered be withdrawn;

3. That the findings of fact entered on said date be now re-entered as the findings of the court, save and except that in all cases where the claimant is therein referred to there be substituted the claimant's decedent;

4. That the statement and opinion of the court filed on the 1st day of December, 1913, be filed as the statement and opinion of the court this day.

5. Upon the foregoing findings of fact the court decides as a conclusion of law that the claimant is entitled to judgment on Findings V and VII in the sum of one thousand six hundred seven dollars and fifty-seven cents ($1,607.57); that the prayer of the claimant
19 for a reformation of the contract is denied; and that the petition is otherwise dismissed.

BARNEY, *J.*, dissents from the judgment on the ground that in his opinion the contract should be reformed.

20 V. *Findings of Fact, Conclusion of Law, Statement and Opinion of the Court.*

Court of Claims of the United States.

No. 29161.

(Decided Nov. 23, 1914.)

CARL U. ACKERLIND, Administrator of the Estate of Erik G. Lind, Deceased,

v.

THE UNITED STATES.

This case having been heard by the Court of Claims, the court upon the evidence, makes the following

Findings of Fact.

I.

On March 2, 1905, a contract, in two parts, was entered into between the claimant's decedent herein and the United States, acting by Lawrence G. Boggs, purchasing pay officer, Navy pay office, New York, for the transportation and delivery of coal at such place in the naval coal depot, Sangley Point, Manila Bay, P. I., as the commandant thereof may direct, which said contract is set out in full in the statement preceding the opinion of the court on the question of the reformation of the contract.

The parts of the contract which are material to the case aside from the question of reformation of the contract are as follows:

"4. Each ship * * * when loaded to sail immediately and directly for Cavite; upon arrival there to report to the commandant and be subject to his orders in the matter of discharge.

"5. All expenses of loading to be borne by the contractors; the Government discharges cargo at its expense.

"6. The Government guarantees but twenty (20) feet of water at coaling wharf, Sangley Point.

"7. Cargo to be discharged at the rate of 400 tons per day for such part of cargo as may be necessary to discharge in the bay to enable a vessel of deep draft to go to the wharf, and 600 tons per day at wharf, Sundays and legal holidays excepted in each instance, or the Government pays demurrage at the rate of 8 cents per ton per day on the net registered tonnage of the vessel for any detention caused by the Government (through fault of its own) not discharging at the above-named rates. * * *.

"8. Each cargo to be delivered in good condition alongside the wharf or alongside any vessel or lighter where the carrier can safely lie afloat, as may be directed by the commandant.

"13. While an average daily discharge of 400 tons in the stream

and 600 tons at the wharf is guaranteed, the commandant will be instructed to discharge the cargo as expeditiously as practicable with a view of exceeding these rates without working overtime."

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II.

Claimant's decedent used seven vessels in the transportation of the coal under said contract, namely, the Knight of St. George, Selsdon, Coronation, Croydon, Kelvinbank, Fitzclarence, and the Kalibia, and one vessel, the Needles, was used to transport coal under a contract dated July 3, 1905. On all of said vessels, except the Kelvinbank and Fitzclarence, demurrage is claimed.

III.

The dates of arrival of said vessels and of the discharge of their respective cargoes are as follows:

Name of vessel.	Reported arrival.	Date of discharge.
Knight of St. George	May 23, 11 a. m.	June 13, 5.30 p. m.
Selsdon	May 26, 5.30 p. m.	June 24, 11 a. m.
Coronation	May 31, 11 a. m.	June 30, 5.30 p. m.
Croydon	June 16, 2 p. m.	July 3, 12 m.
Kalibia	July 17, 9.20 a. m.	Aug. 3, 1 p. m.
Kelvinbank	July 18, 3.30 p. m.	July 29, 12 p. m.
Fitzclarence	Aug. 4, 2.40 p. m.	Aug. 16, 4 p. m.
Needles	Sept. 28, 2 p. m.	Oct. 13, 5 p. m.

IV.

The whole cargoes of the Knight of St. George, Coronation, Kalibia, and Needles were discharged in the stream. The Selsdon discharged 740 tons in the stream, 4,681 tons at the wharf, and the balance of cargo, 676 tons, was discharged in the stream.

The Croydon was taken to the wharf upon arrival, at which time she was drawing 22 feet 6 inches, and discharged 3,533 tons there and the balance was discharged in the stream.

V.

Under the terms of the contracts claimant was paid for all demurrage due on said vessels on the basis of discharge at the rate of 400 tons a day for the number of tons sufficient to lighten ship to 20 feet draft and 600 tons a day thereafter, except on the Kalibia and the Needles, on which there was demurrage on said basis of $208.23, which was disallowed by the accounting officers of the Treasury.

VI.

The vessels on which demurrage is claimed have been lightened to a draft of 22 feet 6 inches upon the following loads:

	Tons.
Knight of St. George	5,950
Selsdon	6,079
Coronation	6,300
Croydon	5,530
Kalibia	6,336
Needles	6,357

22 and if the commandant was required to discharge each vessel at the rate of 400 tons a day for the number of tons sufficient to lighten ship to 22 feet 6 inches, and 600 tons a day thereafter, claimant's decedent would be entitled to demurrage on three of said vessels, namely, the Knight of St. George, Kalibia, and Needles, to the amount of $1,128.81.

VII.

In the course of the discharge of the cargoes of said vessels the following expenses were incurred and paid for by claimant's decedent, namely:

For coal	$1,110.68
For donkeyman's wages	60.06
For coal passer's wages	10.15
For oiler's wages	4.20
For engineer's and officer's wages overtime at night	21.00
For oil	18.50
For rope and gear supplied	74.75
For wear and tear of gear	100.00
Total	$1,399.34

VIII.

Said vessels were required to pay upon arrival at Manila to the customs officials of the Philippine Islands port charges as follows:

Tonnage dues	$1,279.54
Entrance and clearance stamps	36.00
Overtime, extra services of customs employees	61.87
Total	$1,377.41

IX.

While discharging the cargo of the Knight of St. George, a steam connection on the donkey boiler belonging to the ship blew out, causing a delay of 19½ hours, for which no allowance was made to claimant's decedent in computing the time occupied in discharging cargo in excess of lay days. If the claimant's decedent should not be charged with the time lost by said accident to the donkey boiler then he is entitled to demurrage amounting, at the contract rate, to $192.85.

X.

If the contract were reformed, as requested by claimant, by the elimination of the last clause of paragraph 7, to wit, the words, "and further, that in the event of a cargo arriving before the preceding cargo is discharged, twenty-four hours' notice of arrival shall be given after discharge of each cargo before lay days commence in case of that next arriving," the claimant would be entitled to recover for demurrage, as follows:

(1) If the discharge should be at the rate of 400 tons a day until the ship would lighten to 20 feet draft and 600 tons a day thereafter, the sum of $6,028.21

(2) If the discharge should be at the rate of 400 tons a day until the ship would lighten to 22 feet 6 inches and 600 tons a day thereafter, the sum of $8,245.65.

23 *Conclusion of Law.*

Upon the foregoing findings of fact the court decides as a conclusion of law that the claimant is entitled to judgment on Findings V and VII in the sum of sixteen hundred and seven dollars and fifty seven cents ($1,607.57).

The petition otherwise is dismissed.

The petition seeks the re-formation of a written contract and an enforcement of the contract as re-formed. The defendants deny any right of re-formation.

Statement.

The Bureau of Equipment of the United States Navy entered into negotiations with the claimant's decedent for the transportation of a large quantity of coal to the Philippines, and a contract was subsequently made and signed under the direction of the Bureau of Supplies and Accounts dated March 2, 1905, and which is as follows:

Navy Pay Office Contract

Account of:

Req. No. 204, Bu. Equipment.	Contract No., 227.
Station Bureau.	Series, 1905.
App'n Coal & Trans., 1905.	Pay office, New York.

This contract, of two parts, made and concluded this second day of March, A. D. 1905, by and between Lind and Co., of 1 Broadway, New York, in the State of New York, party of the first part, and the United States, by the purchasing pay officer, United States Navy pay office, New York, acting under the direction of the Secretary of the Navy, party of the second part, Witnesseth, that for and in consideration of the payments hereinafter specified, the party of the first part, for themselves and their personal and legal representatives, do

hereby covenant and agree to and with the party of the second part, as follows, viz:

That they, the said party of the first part, will furnish and deliver, at their own risk and expense, at such place in the naval coal depot, Sangley Point, Manila Bay, P. I., as the commandant thereof may direct, and within specified days from the date of this contract, the following articles, and at the price set opposite each item, respectively:

Requisition No. 204, Bureau of Equipment for Naval Service.

1. Transportation of 30,000 tons (10% more or less) best quality bituminous coal from Baltimore, Md., Philadelphia, Pa., Lambert's Point, Va., or Newport News, Va. (loading port for each cargo at the option of the Bureau of Equipment), to the U. S. naval coal depot, Sangley Point, Manila Bay, Philippine Islands.

2. Shipment of the entire quantity to be made at the earliest practicable date in such steamers of foreign registers as may hereafter be nominated by the contractors and accepted by the Bureau.

24 3. The first steamer to load under this contract to be ready to load about Feb. 25, 1905; other steamers to follow rapidly, and to be ready to load on such dates as may be acceptable to the Bureau of Equipment.

4. Each ship to be consigned to the contractor for supplying the coal at the port designated by the Bureau of Equipment, and upon reporting for cargo to take her turn in loading, it being understood that Government dispatch will be accorded. When loaded, to sail immediately and directly for Cavite; upon arrival there to report to the commandant, and be subject to his orders in the matter of discharge.

5. All expenses of loading to be borne by the contractors; the Government discharges cargo at its expense.

6. The Government guarantees but twenty (20) feet of water at coaling wharf, Sangley Point.

7. Cargo to be discharged at the rate of four hundred (400) tons per day for such part of cargo as may be necessary to discharge in the bay to enable a vessel of deep draft to go to the wharf, and six hundred (600) tons per day at wharf, Sundays and legal holidays excepted in each instance, or the Government pays demurrage at the rate of eight (8) cents per ton per day on the net registered tonnage of the vessel for any detention caused by the Government (through fault of its own) not discharging at the above-named rates, it being understood that twenty-four (24) hours' notice of arrival of each cargo under this charter shall be given the commandant before lay days commence; and further that in the event of a cargo arriving before the preceding cargo is discharged, twenty-four (24) hours' notice of arrival shall be given after discharge of each cargo before lay days commence in case of that next arriving.

8. Each cargo to be delivered in good condition alongside the wharf or alongside any vessel or lighter where the carrier can safely lie afloat, as may be directed by the commandant.

9. Freight to be paid for the number of tons certified to have bee received from each ship, by vouchers prepared at the department o receipt of advice from the commandant of discharge; but under n circumstances shall payment be made on any quantity in excess o the bill of lading weight.

10. If, upon discharge of a cargo, the quantity of coal discharge should fall short 1 per cent or less from the bill of lading weight, suc shortage will be disregarded and payment made on bill of ladin weight. If, however, the shortage exceed 1 per cent, such exces shall be paid for by the contractors at the rate per ton for bunker coa at point of loading, the amount to be deducted before payment i made for freight.

11. Any question of demurrage to be settled at Washington.

12. There shall be no wharf charges at Sangley Point.

13. While an average daily discharge of four hundred (400) ton in the stream and six hundred (600) tons at the wharf is guaranteed the commandant will be instructed to discharge the cargo as expe ditiously as practicable with a view of exceeding these rates withou working overtime.

25 14. Each ship loading under the contract to be nominated at least five (5) days prior to reporting to load.

15. Vessels may go via Cape of Good Hope or the Suez Canal a the option of the owners.

It is hereby mutually and expressly covenanted and agreed by and between the parties hereto that the article or articles to be furnished or services to be performed under this contract shall conform in all respects to the requirements of the specifications hereunto annexed, which specifications, the "Conditions," and the "Instructions," printed on the proposal of the party of the first part, shall be deemed and taken as forming a part of this contract with the like operation and effect as if the same were incorporated herein; and said article, articles, or services shall, upon delivery or completion, be subject to inspection and examination by the officer or officers authorized by the party of the second part to inspect and examine the same; and no article furnished or services performed under this contract shall be accepted until it or they shall have been inspected and approved by such officer or officers; and any of said articles not so approved shall be removed by the party of the first part at their own expense and within ten days after notification.

It is further covenanted and agreed, as aforesaid, that if the party of the first part shall fail to deliver any or all of the articles or materials or to perform any or all of the services herein contracted for, in conformity with the conditions and requirements of this contract, the party of the second part shall make deductions as follows from the contract price of all supplies not satisfactorily delivered or services not satisfactorily performed by the last day of the time fixed therefor by this contract, viz:

Up to and including ten thousand dollars ($10,000) in value at contract prices at the rate of one-tenth of one per cent and above ten thousand dollars ($10,000) at the rate of one-twentieth of one per cent for each day's delay until satisfactory delivery or perform-

ance shall have been made, or until such time as the party of the second part may procure the same as hereinafter provided; rejection of deliveries or performance not to be considered as waiving deductions. In case the deductions to be made hereunder should equal three per cent of the stipulated value of the articles or materials not so delivered or services not so performed, this contract may, at the option of the Bureau of Supplies and Accounts, be canceled, and the party of the first part barred from competition for future contracts: Provided, That delays on account of which deductions may be made or this contract canceled, as herein stated, caused by strikes, riots, fire, or other disaster, or delays in transit or delivery on the part of transportation companies, or when no damage or inconvenience has been suffered by the Government, may, in the discretion of the Bureau of Supplies and Accounts, be accepted as sufficient cause for waiving such deductions or cancellation.

It is, however, further covenanted and agreed, as aforesaid, that the party of the second part may, in case he should so elect, purchase in open market, or by contract with some other person, such of said articles or materials, or procure the performance of such ser-
26 vices, as the party of the first part shall fail to deliver or perform as required, and may demand and recover from the said party of the first part the difference between the price so paid therefor and the price herein stipulated; and the party of the first part hereby binds themselves and their representatives aforesaid to pay the amount of such difference to the party of the second part on demand, it being understood that no deductions for delays shall be made in accordance with the preceding clause hereof from the price of any article or material or service, after the same shall be delivered or performed, when purchased or procured as provided in this clause.

It is further covenanted and agreed, as aforesaid, that the said party of the first part shall indemnify the United States and all persons acting under them for all liability on account of any patent rights granted by the United States which may affect the adoption or use of the article herein contracted for; that no Member of or Delegate to Congress, nor any person belonging to or employed in the naval service, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom, except as a member of a corporation; that any transfer of this contract, or of any interest therein, to any other person or party than said party of the first part shall annul this contract so far as the United States are concerned; that if said party of the first part shall fail in any respect to perform this contract on their part, it may, at the option of the United States, be declared null and void, without prejudice to the right of the United States to recover for defaults herein or violations hereof.

And this contract further witnesseth, that the United States, party of the second part, in consideration of the foregoing stipulations, do hereby covenant and agree, to and with the party of the first part, as follows, viz:

That upon the presentation of the customary bills and the proper evidence of the delivery, inspection, and acceptance of the said

article, articles, or services, and within ten days after the warrant shall have been passed by the Secretary of the Treasury, there shall be paid to the said Lind & Co., or to their order, by the Navy paymaster for the port of New York the sum of one hundred and forty-six thousand two hundred and fifty dollars ($146,250) (estimated) for all the articles delivered or services performed under this contract: Provided, however, That no payments shall be made until all the articles or services shall have been delivered or performed and accepted, except at the option of the Bureau of Supplies and Accounts.

It is mutually understood and agreed, as aforesaid, that no payment or allowance to said party of the first part will or shall be made by the United States for or on account of this contract except as herein specified; that ten per cent will be withheld from the amount of each payment herein stipulated as security for the full completion and performance of their covenants and agreements by the said party of the first part, who shall, when all the articles to be delivered or services to be performed hereunder shall have been accepted, be entitled to receive the aggregate amount of such reservations.

27 In witness whereof the said parties hereto have hereunto set their hands and seals the day and year first above written.

LIND & Co. [L. S.]
ERIK G. LIND [L. S.]
L. G. BOGGS, [L. S.]
Pay Director, U. S. N., Purchasing Pay Officer,
U. S. Navy Pay Office, New York, N. Y.

Signed and sealed in the presence of—

A. S. GOULD,
As to Party of the First Part.
F. W. PATTERSON,
As to Purchasing Pay Officer.

The clause sought to be eliminated in this proceeding appears in paragraph 7 of the contract, and reads: "And, further, that in the event of a cargo arriving before the preceding cargo is discharged twenty-four (24) hours' notice of arrival shall be given after discharge of each cargo before lay days commence in case of that next arriving."

No depositions having been taken there are here set out certain statements appearing in the record in the replies of the Navy Department to "calls" made by this court on motions of the claimant.

The specifications sent by the Bureau of Equipment to the Bureau of Supplies and Accounts in its requisition were as follows:

Class 11.

1. Transportation of 30,000 tons (10%, more or less) best quality bituminous coal from Baltimore, Md., Philadelphia, Pa., Lambert's Point, Va., or Newport News, Va. (loading port for each cargo at the option of the Bureau of Equipment), to the U. S. naval coal depot, Sangley Point, Manila Bay, Philippine Islands, at $4.87½ per ton of 2,240 lbs., $146,250.00.

2. Shipment of the entire quantity to be made at the earliest practicable date in such steamers of foreign registers as may hereafter be nominated by the contractors and accepted by the bureau.

3. The first steamer to load under this contract to be ready to load about Feb. 25, 1905; other steamers to follow rapidly and to be ready to load on such dates as may be acceptable to the Bureau of Equipment.

4. Each ship to be consigned to the contractor for supplying the coal at the port designated by the Bureau of Equipment, and upon reporting for cargo to take her turn in loading, it being understood that Government dispatch will be accorded. When loaded to sail immediately and directly for Cavite; upon arrival there to report to commandant and be subject to his orders in the matter of discharge.

5. All expenses of loading to be borne by the contractors. The Government discharges cargo at its expense.

6. The Government guarantees but twenty (20) feet of water at coaling wharf, Sangley Point.

7. Cargo to be discharged at the rate of four hundred (400) tons per day for such part of cargo as may be necessary to discharge in the bay to enable a vessel of deep draft to go to the wharf, and six hundred (600) tons per day at wharf, Sundays and legal holidays excepted in each instance, or the Government pays demurrage at the rate of eight (8) cents per ton per day on the net registered tonnage of the vessel, for any detention caused by the Government (through fault of its own), not discharging at the above-named rates, it being understood that twenty-four (24) hours' notice of arrival of each cargo under this charter shall be given to the commandant before lay days commence; and, further, that in the event of a cargo arriving before the preceding cargo is discharged, twenty-four (24) hours' notice of arrival shall be given after discharge of each cargo before lay days commence in case of that next arriving.

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8. Each cargo to be delivered in good condition alongside the wharf or alongside any vessel or lighter where the carrier can safely lie afloat, as may be directed by the commandant.

9. Freight to be paid for the number of tons certified to have been received from each ship, by vouchers prepared at the department on receipt of advice from the commandant of discharge; but under no circumstances shall payment be made on any quantity in excess of the bill of lading weight.

10. If upon the discharge of a cargo the quantity of coal discharged should fall short 1 per cent or less from the bill of lading weight, such shortage will be disregarded and payment made on bill of lading weight. If, however, the shortage exceed 1 per cent, such excess shall be paid for by the contractors at the rate per ton for bunker coal at point of loading, the amount to be deducted before payment is made for freight.

11. Any question of demurrage to be settled at Washington.

12. There will be no wharf charges at Sangley Point.

13. While an average daily discharge of four hundred (400) tons in the stream and six hundred (600) tons at the wharf is guaranteed,

the commandant will be instructed to discharge the cargo as expeditiously as practicable with a view of exceeding these rates without working overtime.

14. Each ship loading under the contract to be nominated at least five (5) days prior to reporting to load.

15. Vessels may go via Cape of Good Hope or the Suez Canal at the option of the owners.

Order to be placed with Messrs. Lind & Co. 1 Broadway, New York, N. Y. (Bureau open-purchase requisition, No. 204, Navy Department.)

After receipt of the foregoing requisition by the Bureau of Supplies and Accounts, Pay Director Boggs was instructed to draw a contract and to execute it on behalf of the United States, his orders emanating from the office of the Paymaster General, who is Chief of the Bureau of Supplies and Accounts. Thereafter Pay Director Boggs, having prepared the contract in duplicate, it was executed in the above form by the claimant's decedent and by Pay Director Boggs for the United States, and the claimant's decedent proceeded with its performance.

In May, 1905, the commander at Cavite, ascertaining that there was a difference between the terms of the requisition furnished him and the charter parties of ships arriving with the coal, wrote the Bureau of Equipment to that effect, and on or about June
29 17, 1905, said bureau was informed of the fact that the written contract had included the said clause, and requested the Bureau of Supplies and Accounts to amend the contract by omitting said clause. This request having been submitted to the Paymaster General, he referred the same to Pay Director Boggs, authorizing him to amend the contract by the omission of the clause in question. A cablegram was then transmitted by the Bureau of Equipment to the commander at Cavite as follows:

"Requisitions 149, 151, paragraph 6, requisitions 204, 206, paragraph 7, last clause must be stricken out, requiring twenty-four hours' notice to be given on arrival after the discharge each cargo before lay days commence in case of next ship arriving. Lay days commence twenty-four hours after arrival each ship under requisitions mentioned."

and on June 23, 1905, the pay director notified claimant's decedent of the amendment, as follows:

NAVY PAY OFFICE,
280 BROADWAY,
NEW YORK, June 23rd, 1905.

GENTLEMEN: Referring to navy pay office contract #227, dated March 2nd, 1905, based on bureau requisition No. 204, equipment:

1. By direction of the Bureau of Supplies and Accounts, paragraph 7 of said contract is hereby amended by the omission of the last clause, reading as follows:

"And further that, in the event of a cargo arriving before the preceding cargo is discharged, 24 hours' notice of arrival shall be given,

after discharge of each cargo, before lay days commence in case of that next arriving."

2. Please acknowledge the receipt of this letter, as to whether or not the amendment as above is satisfactory to you.

Respectfully,

L. G. BOGGS,
Pay Director, U. S. N.

Messrs. Lind & Company, #1 Broadway, New York.

No answer to this communication appears.

In response to a request from the Comptroller of the Treasury "relative to alleged modifications of contract governing transportation of coal to Cavite" the Acting Chief of the Bureau of Equipment under date of November 1, 1905, replied as follows:

"BUREAU OF EQUIPMENT,
"WASHINGTON, D. C., Nov. 1, 1905.

"3. The printed specifications, upon which proposals were originally requested, were drawn by the bureau and contained the unusual clause providing that each ship arriving at Cavite would be required to give the commandant 24 hours' notice of arrival after the next preceding ship. This clause, however, met with very serious objections on the part of the prospective contractors. At the time the specifications were drawn there was no particular urgency in getting coal to Manila, and it was the intention of the bureau to make a single contract under them which would enable the contractor to arrange his own schedule of sailings to avoid the arrival of more than one ship at the same time. Between the time these specifications were originally drawn and the time the department finally authorized the bureau to conclude a contract for the transportation of coal to Cavite in foreign bottoms the stock of coal at Cavite became so reduced that there was on hand less than one month's supply for the ships on that station, and it became imperatively necessary that the greatest expedition be exercised and a stock of coal laid down at Cavite quickly, regardless of cost. This was impressed upon the contractors, and it was specifically understood and agreed that in the event of them getting ships that could report to load promptly, without regard to schedule or to anything other than to get coal to Cavite quickly, that the clause referred to in this correspondence would not be incorporated in the specifications governing the contract, but that usual bureau conditions, i. e., lay days to commence 24 hours after the arrival of the ship, should govern. Through a clerical inadvertence, however, in the preparation of the requisition the objectionable clause was incorporated in the specifications, and the bureau's attention was not called to the fact until the matter was brought up by the arrival of several vessels at Cavite, and the Bureau of Supplies and Accounts was requested to make the necessary modifications, the cablegram referred to in paragraph 3 of the comptroller's letter being merely a notification of this bureau to the commandant at Cavite, who has been furnished by the bureau

with a copy of the specifications governing each of the contracts, that a modification had been made for his guidance in the matter."

On March 1, 1907, the Secretary of the Navy, in reply to a call in this case, said that "All preliminary details, upon which contracts governing the purchase of coal and its transportation are based, are arranged by the Bureau of Equipment and all terms settled by that bureau in advance of the submission of a requisition. A requisition covering the transaction is then prepared and forwarded to the Bureau of Supplies and Accounts, upon which a formal contract is prepared and entered into by that bureau or one of its agents."

It appears from the letters of the Chief of the Bureau of Equipment to the Auditor for the Navy Department under date of September 12, 1905, referring to said specifications that—

"It should also be stated that when the specifications governing this contract were drawn it was contemplated to make a contract with but one concern. The exigencies of the service, however, made it necessary that several contracts be made with as many concerns."

A communication from claimant's decedent, dated January 2, 1906, addressed to the comptroller's office, reads as follows:

"The proposals received from the Navy pay office and the contract were not carefully read by us before signing. At the time of signing these papers we glanced over them in a perfunctory manner, not feeling the necessity of reading them over carefully. * * * We did not know of the presence of the objectionable clause. Had we noticed its presence, we would not have signed the papers. * * *."

31 Section 419, Revised Statutes, provides as follows:

"SEC. 419. The business of the Department of the Navy shall be distributed in such manner as the Secretary of the Navy shall judge to be expedient and proper among the following bureaus:

"First. A Bureau of Yards and Docks.

"Second. A Bureau of Equipment and Recruiting.

"Third. A Bureau of Navigation.

"Fourth. A Bureau of Ordnance.

"Fifth. A Bureau of Construction and Repair.

"Sixth. A Bureau of Steam Engineering.

"Seventh. A Bureau of Provisions and Clothing.

"Eighth. A Bureau of Medicine and Surgery."

The act of March 2, 1889 (25 Stat., 817), provides:

"It shall be the duty of the Bureau of Provisions and Clothing to cause property accounts to be kept of all the supplies pertaining to the Naval Establishment, and to report annually to Congress the money value of the supplies on hand at the various stations at the beginning of the fiscal year, the dispositions thereof, and of the purchases and the expenditures of supplies for the fiscal year, and the balances remaining on hand at the end thereof."

By later enactments the Bureau of Provisions and Clothing was designated as the Bureau of Supplies and Accounts.

The Navy Regulations covering the period in question, so far as material, are as follows:

"5. (1) The duties of the Bureau of Equipment shall comprise

all that relates to the equipment of ships * * *. It shall require for all coal for steamers' and ships' use, including expenses of transportation, storage, and handling the same * * *.

"10. (1) The duties of the Bureau of Supplies and Accounts shall comprise all that relates to * * * the purchase of all supplies for the Naval Establishment, except supplies for the Marine Corps; and the keeping of a proper system of accounts of the same.

"(5) It shall have charge of all shipments * * *.

"1319. All purchases and payments for the same shall be made under the direction of the Paymaster General of the Navy, and orders directing such purchases shall be given only by him. When open-purchase requisitions have been approved by chiefs of bureaus, they shall be transmitted to the Paymaster General for his action.

"1320. Immediate purchase under open-purchase requisitions shall be ordered only when an exigency exists that will not permit the delay incident to advertisement and contract.

"1321. (9) The original of every contract entered into by a purchasing pay office shall be forwarded to the Auditor for the Navy Department; one copy shall be immediately forwarded to the Bureau of Supplies and Accounts; one to the general storekeeper of the navy yard at which delivery is to be made; one to the contractor; one shall be retained by the purchasing pay officer; and one shall be filed in the returns office of the Department of the Interior, as soon after the contract is made as possible, and within thirty days, together with all bids, offers, and proposals to him made by persons to obtain the same, and with the evidences of the action taken
32 by him to obtain bids, offers, or proposals for the same, including a list of the dealers invited to bid. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order according to the number of papers composing the whole return."

[Before making such return it shall be the duty of such officer to affix to the same his affidavit in the form prescribed by section 3745 Revised Statutes.]

"1322. (1) For all supplies needed that are not obtainable under existing contracts, with the exception * * * of those which may be purchased upon the requisition of a chief bureau by direct order of the Paymaster General, requisition shall be submitted by a general storekeeper in quadruplicate, numbered in a separate series for each bureau and beginning a series for each new fiscal year.

"(2) All requisitions shall be strictly according to prescribed forms and complete * * *."

Opinion.

CAMPBELL, Ch. J., delivered the opinion of the court:

The first question presented for our consideration is that of reformation of the contract set out in the petition.

The right to reform a written instrument so as to make it speak the intention of the parties when by a mutual mistake of the parties

the terms of the agreement between them are not correctly expressed in the instrument as written is unquestioned.

The reformation of written contracts for fraud or mistake is an ordinary head of equity jurisdiction. The rules which govern the exercise of this power are founded in good sense and are well settled. Where the agreement as reduced to writing omits or contains terms or stipulations contrary to the common intention of the parties the instrument will be corrected so as to make it conform to their real intent. The parties will be placed as they would have stood if the mistake had not occurred. (Hearne v. Marine Ins. Co., 20 Wall., 411, 490; Simmons Creek Co. v. Doran, 142 U. S., 417.) And this court has jurisdiction under the statute to reform instruments as courts of equity may. (United States v. Milliken Imprinting Co., 202 U. S., 168.)

Where the relief is sought upon the ground of mistake alone, there being no fraud or inequitable conduct alleged or relied upon, the mistake must be mutual and not merely the mistake of one of the parties. "It must appear that both have done what neither intended. A mistake on one side may be ground for rescinding, but not for reforming, a contract. Where the minds of the parties have not met there is no contract, and hence none to be rectified." (Hearne v. Marine Ins. Co., supra; Moffett v. Rochester, 178 U. S., 373; Lyman v. U. S. Ins. Co., 17 Johns, 377.)

For, as was expressed by Chief Justice Ames in Diman v. Providence Co. (5 R. I., 130): "If the court were to reform the writing to make it accord with the intent of one party only to the agreement, who avers and proves that he signed it as it was written by mistake, when it accurately expressed the agreement as understood by the other party, the writing, when so allowed, would be just as
33 far from expressing the agreement as it was before, and the court would be engaged in the singular office of doing right to one of the parties at the cost of a precisely equal wrong to the other."

In Christopher v. 23d St. Ry. Co. (149 N. Y., 51; 43 N. E. R., 538) the same idea is expressed, as follows: "If it was such a contract as one of the parties intended to make and the one it understood the others also intended to make, the court had no power to reform it (Paine v. Jones, 75 N. Y., 593), as under such circumstances it would be making a new contract for the parties and unjust to the ones who made no mistake," citing Nevins v. Dunlop (33 N. Y., 676), Lyman v. Ins. Co. (17 Johns, 373). And to the same effect is Greene v. Stone (54 N. J. Eq., 387; 55 Am. St. R., 387), where it is said: "Rectification can only be had where both parties have executed an instrument under a common mistake and have done what neither of them intended. A mistake on one side may be ground for rescinding, but not for correcting or rectifying, an agreement." (See also 34 Cyc. Title Reformation, 915; 1 Story Eq. Juris., sec. 151.)

Where a contract has been executed there is a strong presumption to be indulged that it correctly expresses the intention of the parties, and this presumption is not easily removed. The burden of proof is upon the party seeking the reformation. Mr. Pomeroy says that courts of equity do not grant the high remedy of reforma-

tion upon a probability nor even upon a mere preponderance of evidence, but only upon the certainty of error. (2 Pom. Eq. Juris., 3d ed., sec. 859; Lyman v. Ins. Co., 2 Johns Chy., 632.) Mr. Justice Strong, in the opinion in the Atlantic Delaine Co. v. James (94 U. S., 207), declared that "canceling an executory contract is an exertion of the most extraordinary power of a court of equity" and the reformation of one for an alleged mistake is to be approached with a due regard for the gravity of the result. The general doctrine, as stated by Mr. Justice Miller in Maxwell Land-Grant case (121 U. S., 325), is that the testimony on which a court of equity will reform a written instrument must be clear, unequivocal, and convincing, and that it can not be done on a mere preponderance of the evidence.

And a proposition sustained by the authorities is that the evidence of mutuality of mistake must relate to the time of the execution of the instrument and show that at that particular time both parties intended to say a certain thing and by mistake expressed another thing. (34 Cyc., 919.)

Before proceeding to an application of these principles to the facts we deem it proper to say that the statements which have been referred to come into this case through "calls" made by this court upon the Secretary of the Navy under the terms of sec. 1076, Revised Statutes, and this court has held on several occasions that the "replies" which are made to these "calls," whatever may be their terms, can not admit away or waive any valid defense of the United States to a claim. (Leonard's case, 18 C. Cls., 385.) While admitting official reports and correspondence of public officers in the line of their duty as evidence, the court said in the Waters case (4 C. Cls., 389, 391), "But it is not the business of a public officer to make admissions against the Government, nor can any such admissions bind the defendants." And as was said in the Allen case (28 C.
34 Cls., 146), "Where a case is tried on its merits the testimony is confined to the record evidence, the oral statements of witnesses in court or their depositions taken upon notice in accordance with the statute and the rules of the court." (See also Whiteside's case, 93 U. S., 247.) We are constrained to cite these cases because in the present case no deposition of any witness is taken, and we do not wish to establish a precedent in this case different from the settled practice of the court. But as the parties have submitted the cause without objection to the form or competency of the testimony, we shall in this case proceed to consider it.

The defendants, while they do not deny the general power of a court of equity to reform instruments, insist, in the first place, that the instrument in question can not be reformed because of section 3744, Revised Statutes, which makes it the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior—

"to cause and require every contract made by them, severally, on behalf of the Government, and by their officers under them, appointed to make such contracts, to be reduced to writing and signed by the contracting parties with their names at the end thereof."

The construction given this statute and the sections of the Revised Statutes, immediately following, is that oral agreements, made by any of said officers, are absolutely void until reduced to writing and signed as directed by the statute, or, as stated by the Supreme Court in Clark v. United States (95 U. S., 539): "It makes it unlawful for contracting officers to make contracts in any other way than by writing signed by the parties. This is equivalent to prohibiting any other mode of making contracts." And, as it is well established that "the United States, as a body politic, act only by public officers who are special agents intrusted with specific defined duties, and who can bind the Government only to the extent of the authority conferred upon them" (McCullom's case, 17 C. Cls., 92), it is argued that the written instrument, as signed by the parties, is the expositor of their contract and that preliminary oral agreements, being void by the terms of the statute, can not be considered in order to reform the written instrument. It is true that said statute (secs. 3744 et seq., Rev. Stat.) not only requires the contracts of said Government agents to be in writing and signed by them, but also provides heavy penalties against the agents who violate it, and it is frequently referred to in the decisions as a statute to prevent frauds and perjuries. Its title was "An act to prevent and punish fraud on the part of officers intrusted with making of contracts for the Government." (12 Stat. L., 411.) (See Danold's case, 5 C. Cls., 65; Lindsley's case, 4 Ib., 359.) But it is also true that the statute of frauds, as is known to the courts in the several States of the Union, has been uniformly construed as not preventive of the exercise by a court of equity of its jurisdiction to reform written instruments as evidence of contracts, required by said statutes to be in writing. But it may be added that said section (3744) is perhaps stricter than the "statute of frauds" in that part performance is not sufficient to authorize the enforcement of a contract which is not executed as it prescribes. (St. Louis Grain & Hay Co. case, 37 C. Cls., 281.)

35 And while, as pointed out in the argument, the statute refers by name to only three of the departments and pronounces heavy penalties for its violation, we are not prepared to go to the extent of hlding that, where a written contract is made by the officials referred to in the statute and by mutual mistake it fails to express the intention of the parties, the party injured by the mistake is without remedy. We do think, however, that the purpose and policy of said statute should have some effect in this case, not as necessarily forbidding the reformation of an instrument, if it should, under the facts be reformed, but as emphasizing the care and diligence which parties entering into written contracts with agents of the Government should observe.

"Every man is supposed to know the law. A party who makes a contract with an officer, without having it reduced to writing, is knowingly accessory to a violation of duty on his part. Such a party aids in the violation of the law." (Clark's case, 95 U. S., 539.) It may therefore be said that a party is enjoined by the statute, or at least by the policy of it, to observe that the agreement he makes is correctly expressed in the contract which he signs. For to allow care-

lessness to take the place of care, to admit inattention where prudence is proper and thus to excuse a party from the obligations of contracts which must be "in writing and signed by the contracting parties" may tend to an infraction of the salutary policy of the statute in question; because if the remedy be made too easy an invitation to make mistakes may be extended. It may be added, however, that there is nothing in the case before us which impeaches the good faith of the parties concerned in the alleged mistake.

Applying the principles of law above stated to the facts of the case as they appear above, does the claimant show a case of mutual mistake justifying the reformation of the instrument in question?

The Navy Department was in urgent need of coal in the Philippine Islands. Before this urgency developed it is apparent that certain specifications had been provided looking to the transportation of the coal by a number of parties, and these specifications included the clause which is the subject of this controversy, and the clause itself is characterized in the above statement by the acting chief of bureau as an "unusual" clause. The Bureau of Equipment was the agency of the Navy Department which was vested with the power to negotiate for the transportation of the coal, and entered into negotiations with the claimant's decedent. Its powers and the sphere of its operations were well defined by the Navy regulations and of these the claimant's decedent must be held to have had notice. Nothing is better settled than the doctrine that one who deals with a Government official is bound to know the extent of his authority. "It is the business of everyone so dealing to see that the public agent with whom he is negotiating is acting within the scope of his powers. If the transactions were with a private agent he would be bound to do so, and there is no reason why the rule should be relaxed in relation to public officers; but, on the contrary, every consideration of public convenience, policy, and morality requires that it should be strictly adhered to and enforced." (Henderson's case, 4 C. Cls., 75; Hawkins' case, 96 U. S., 689.) The form of specifications which it was contemplated the Government would incorporate in the contract
36 for transporting the coal was examined by the claimant's decedent and he objected to the clause in question. The agent of the Bureau of Equipment who was dealing with claimant's decedent agreed with claimant's decedent that the objectionable clause would be eliminated from the specifications and the other terms were settled between them. If the Bureau of Equipment has possessed the authority to make a contract with claimant's decedent binding upon the United States, its dealings with claimant's decedent would not have amounted to a contract, because until reduced to writing and signed by the contracting parties it was void by the terms of the statute, section 3744. (Clark's case, supra.) But that bureau had not the authority to make a contract. At most it could enter into negotiations forming the basis of a contract which could be made under the auspices of another bureau. The claimant's decedent not only knew that his negotiations with the Bureau of Equipment were worthless until a written contract was made, but he also knew that the contract could only be made through the Paymaster General's

Office or by the Secretary of the Navy, it being so designated in the Navy regulations in conformity to statute.

The specifications were included in a requisition made by the Bureau of Equipment, and by a "clerical inadvertence" (we are told) the said clause was not stricken from the specifications, and the requisition carrying the objectionable clause went forward to the proper officer and ultimately reached the Bureau of Supplies and Accounts. Up to this point there was nothing binding upon the defendants, and a contract was to be made which, though it included the specifications referred to, contained stipulations binding the claimant's decedent and the United States alike to grave responsibilities and obligations respectively. It was accordingly prepared under instructions from the Paymaster General's Office by Pay Director Boggs in duplicate. It included the said specifications as shown in the requisition. Neither the Bureau of Supplies and Accounts nor the official who prepared the contract had any knowledge of any negotiations between the Bureau of Equipment, or an agent thereof, and the claimant's decedent further than was given by the requisition. And here again we may advert to section 3744, Revised Statutes.

Its requirements, as the courts have repeatedly held, are mandatory. "The necessity and importance of such a provision to the Government in preventing mistake, imposition, and fraud can scarcely be overestimated." (Henderson's case, 4 C. Cls., 75.) "The facility with which the Government may be pillaged by the presentment of claims of the most extraordinary character if allowed to be sustained by parol evidence, which can always be produced to any required extent, renders it highly desirable that all contracts which are made the basis of demands against the Government should be in writing." (Per Mr. Justice Bradley in Clark v. United States, 95 U. S., 539.) The purpose of the statute is not only to prevent frauds and perjuries, but also to secure certainty and definiteness in the contracts which may be made on behalf of the Government; and these, in the very nature of things, can not be secured where they are left to depend upon parol testimony.

And so mandatory is the statute that the contract shall be in writing and signed by the parties that the preliminary agreement of the parties has no force until a contract in conformity to the stat-
37 ute is executed. The agreement between the Bureau of Equipment and claimant's decedent as to the clause in question, as well as to all the specifications, were mere negotiations, or "preliminary memoranda made by the parties for use in preparing a contract for execution in the form required by law." (South Boston Iron Co. case, 118 U. S., 37; Clark's case, 95 U. S., 539.) "The preliminary advertisements, specifications, and proposals, and acceptance of proposals must be viewed as becoming a part of the statutory contract when a contract was executed as required by statute, but until then only a part of the negotiations looking to a formal contract." (McLaughlin's case, 36 C. Cls., 138, 177.)

"It is the final written instrument that the statute contemplates shall be executed and signed by the parties and which shall contain

and be the proof of their obligations and rights." (Monroe v. United States, 184 U. S., 524.)

The claimant's decedent was thus informed, by the terms of the statute, that he must have a written contract signed by some duly authorized agent of the United States. This agent, by the terms of the statute, was either the Secretary of the Navy or some agency designated by him. Under the Navy Regulations then in force that power was vested in the Paymaster General's Office, and hence we find the contract was executed on behalf of the defendants by Pay Director Boggs under instructions from his superior, and when signed by him and the claimant's decedent it became the contract of the United States. That said pay director signed the contract, as he understood and intended it should be, we have no doubt. With the requisition before him containing the specifications, including the said clause; with the intentional incorporation of the terms of the requisition itself into a separate instrument which would evidence the contract; with his instructions to execute that contract for the United States; with the transmission of that contract so written to the claimant's decedent, and with its execution by Mr. Boggs and the claimant's decedent, we can not escape the conclusion that there was no mistake in the execution of the instrument so far as the Bureau of Supplies and Accounts or the said pay director were concerned, and therefore none so far as the defendants here are concerned.

Nor did the subsequent action of the two bureaus in June, some months after the execution of the contract, in directing that said clause be ignored or eliminated, affect the question of their intention when the instrument was executed. When the Bureau of Equipment learned—probably from the letter of the commander at Cavite—that a difference appeared between his copy of instructions and charter parties held by the ships then arriving—that the said clause was in the contract, it referred the matter to the Bureau of Supplies and Accounts with a request that said clause be eliminated, which in turn referred it to the office of the Paymaster General, and from that official an order emanated to Pay Director Boggs authorizing an amendment of the contract in the particular requested. Thereupon Mr. Boggs addressed a communication to claimant's decedent under date of June 23, notifying him that by direction of the Bureau of Supplies and Accounts the "said contract is hereby amended" by the omission of the clause stated and requested an acknowledgment as to "whether or not the amendment as
38 above is satisfactory to you." No reply to this communication appears in the record. The action of the bureaus and of the pay director did not have the effect of reforming the contract. (Sec. 3744 R. S.; Jones's case, 11 C. Cls., 733; 96 U. S., 24; Wilson's case, 23 C. Cls., 77.) The statute authorizes the Secretary of the Navy to designate parties who can execute contracts, but when he has made the designation as in this case it does not follow that those authorized to execute may thereafter change the terms of the contract. It will be borne in mind that section 3747 requires sworn copies of the contract as executed to be made and deposited, and as

no authority is given by the Secretary to those empowered to execute to modify a contract after its execution the right to do so does not exist. And this is evidently the view of claimant, because he would not be seeking a reformation of the contract if it had been already lawfully modified.

But claimant does insist that the action of the bureaus and of Pay Director Boggs should be considered as evidence of the fact that a mistake was made. And so it may be considered as a realization of the fact of a mistake by the Bureau of Equipment, where it is claimed the mistake originated, but it is not and can not be taken to prove that the party who signed the contract for the United States made a mistake when he executed the identical contract which it was his intention and which he understood should be executed. It will be borne in mind that until the matter was called to their attention in June neither the Bureau of Supplies and Accounts nor Pay Director Boggs had any knowledge of the claim that said clause should not occur in the written contract, and therefore their action at that time throws no light on the intention with which the contract was signed nor relate to the time of the execution of the instrument. As above suggested, the proof of the mutual mistake, which is relied on to reform a written instrument, must refer to a mistake which both parties made when they executed it, and therefore to an agreement between them before it was reduced to writing which is not correctly expressed in the writing.

"It is essential that the extent of the rectification should be clearly ascertained and defined by evidence contemporaneous with or anterior to the contract." (Citizens National Bank v. Judy, 146 Ind., 342.)

"The rule of law that a mistake under consideration to be susceptible of correction must be mutual does not mean that both parties must agree on the hearing that a mistake was in fact made, but that the evidence of mutuality in the mistake should relate to the time of the execution of the instrument, and show that at that particular time the parties intended to say a certain thing and by mistake of fact expressed another." (Mathews v. Whitethorne, 220 Ill., 36; 34 Cyc., 919.)

In other words, what a party might have done if he had possessed knowledge which in fact he did not possess at the time of the transaction does not prove what he intended to do on a prior occasion when he did not possess such knowledge. Nor can we assent to the proposition that the Bureau of Supplies and Accounts acted mechanically under the direction of the Bureau of Equipment. The two bureaus are made distinct by statute and their respective
39 spheres of power are defined by the Navy Regulations. To the one is given the right and power of binding the Government by contract and to the other no such right or power is given. The statute (sec. 3744) implies that the Secretary of the Navy may authorize another than himself to sign contracts, and he has designated such persons. It can not be therefore that the bureau in which is lodged the important power of obligating the United States

by the terms of written contracts is directed by another bureau which is denied the power to contract.

It is insisted, however, by claimant that both of said bureaus were agencies of the Secretary of the Navy and that the act of one in agreeing with him on the specifications was the act of the Secretary, and that the act of the other in executing the contract was also his act, or, as counsel states it, that these two bureaus were in said transaction, respectively, "the brain and the hand" of the Secretary, and therefore that the mistake was his mistake throughout the transaction. It is true that the business of the Department of the Navy is distributed among bureaus in such manner as the Secretary "shall judge to be expedient and proper" (sec. 419, Rev. Stat.); that their duties are performed under his authority, and that "their orders shall be considered as emanating from him." (Sec. 420, Rev. Stat.) But this is not to say that a bureau may bind him when it acts beyond the scope of the power given it, or because two bureaus, each acting in its own sphere, engage at different times in different features of a given transaction, that therefore the several actions become blended into one transaction of the Secretary. On the contrary, the manifest purpose of the said statutes is to distribute the powers and responsibilities of administration among several bureaus with such limitations upon each and such grants to each as the Secretary may determine to be "expedient and proper," and if, as in this case, the mistake of one bureau is treated as the mistake of another and both mistakes as that of the Secretary, then there is no check upon either, and the bestowal of a power upon one bureau is equivalent to a grant of the same power to another regardless of any distribution of the business of the department which the Secretary may have made. Confessedly the Secretary did not have any actual knowledge of the transaction in question, nor can knowledge of it be imputed to him by proof that one of the bureaus made a mistake in the transaction; and if it could be imputed to him that fact would not make the act of another bureau in executing the contract mentioned with claimant's decedent a mutual mistake of the parties to the contract. The contract was not that of the Secretary but was the contract of the United States, though executed by an agent authorized by the Secretary to do so.

There is yet another view which may be considered. The claimant's decedent was not examined as a witness, but the petition alleges that he signed the contract without reading it. The clause in question was of so grave importance that he strenuously objected to its incorporation into the contract when he had the preliminary negotiations with the Bureau of Equipment. He insisted it should be omitted and, because of his objections and the urgency of securing transportation of the coal to Manila Bay, said bureau agreed it should be omitted, and here, so far as claimant is concerned, the question is allowed to rest. He knew a contract was to be "reduced
40 to writing and signed" by another bureau or an agent duly authorized and by himself. He knew one was drawn by that other bureau and sent to him in duplicate, and he signed it as written, containing the clause which he was, at first, so insistent

it should not contain, and he did so without reading it. The contract was an important one, involving many thousands of dollars to the United States and grave responsibilities and engagement on his part. It contained a clause which to him was very objectionable in his negotiations and one that he insisted should be stricken from the specifications, and one which he yet regards as very important, and the only excuse offered (for he does not testify) is that he did not read the contract before signing it, though it was in duplicate, and presumably he kept a copy. Refusal to re-form a written instrument for mistake has been based by the courts on a want of care of the complaining party where the circumstances are not stronger than those which characterized claimant's conduct.

In this connection the claimant relies upon the Snell case (98 U. S., 85). There the complainants' agent had effected insurance to cover their interest in certain cotton, but the insurance, as written, was in the agent's name alone. The court found that a valid contract had been made between the parties and that the agents of the insurance company intended to insure and by direct statements induced complainants' agent to believe that they were giving insurance in his name upon the interest of complainants (his principal), and the agent assented to the insurance being taken in his name because of the distinct representation and agreement that the interest of the complainants in the cotton which was insured would be protected by the policy. It appears also that the policy was not delivered to Keith, the agent of complainants, but was retained for him by the insurance agents, nor did he see it until after the loss covered by it had occurred. Immediately upon being advised by his attorney that the policy as written did not protect the interest of the complainants, Keith, their agent, promptly avowed the mistake and asked that the policy be corrected in conformity with the original agreement. The court says that Keith relied upon the representations of the insurance agents as to the effect of the policy and not unreasonably relied upon their larger experience and greater knowledge in matters concerning the proper mode of consummating by written agreement the contract according to the understanding of the parties, and trusted them to prepare the written agreement.

We think, however, that the said case is not controlling here. There both parties—or the agents of both, who acted for them—understood at the time the written contract was made that the policy was intended to cover the interest of complainants in the cotton, and complainants' agent, in reliance upon the representations of the insurance agents that it did so cover that interest left the policy in their possession and did not see it until after the loss, when he promptly avowed the mistake. The court emphasizes the fact that as soon as he received the policy, consulted counsel, and ascertained the mistake the agent insisted upon its correction. In the present case there was no representation of the meaning of terms in the contract different from their real meaning, and if it be conceded for argument's sake that the claimant shows that the Bureau of Equipment agreed that a certain clause appearing in the form of

41 specifications would not be included in the written contract, that another clause should take its place and that the claimant's decedent had a right to rely upon that bureau, it would still appear that the Snell case would not apply, for after the alleged agreement was made a contract was written by another bureau, signed in duplicate by an officer thereof, and transmitted to claimant's decedent, who also signed it and presumably kept a copy thereof in his possession. If the clause to which he objected, which we are now asked to eliminate, was of such grave importance as to be the subject of "strenuous objections" on his part when negotiating with the Bureau of Equipment, it was but the dictate of common prudence for him to read and, if necessary, to object to the presence of said clause when the contract was sent to him for execution. In the Snell case a valid agreement was made between the respective agents of the parties, while in this case no legal agreement was made or could be made until the contract was written and signed (Clark v. United States, supra), and what preceded the writing and signing were mere negotiations looking to the consummation of a contract. (Monroe case, 184 U. S., 524, and other cases, supra.) We think, therefore, that the case before us is more analogous to Graves v. Boston Ins. Co. (2 Cranch, 419) than to the Snell case, which refers approvingly to the former. In that case it appeared that the complainant sought relief from the effect of a written policy where, by mistake, the name of Graves was inserted in the policy, whereas the names of Graves & Barnewall, the complainants, were intended to be inserted. The court, in an opinion by the Chief Justice, denied relief, saying, "The policy was in the possession of the agent of the plaintiff and ought to have been understood by him before it was executed. He retained it for several months before a mistake was alleged." And this feature appearing in the Graves case is referred to in the Snell case as follows: "Hence in Graves v. Ins. Co. (2 Cranch, 419) this court declined to grant relief against an alleged mistake in the execution of a policy, partly because the plaintiff's agent had possession of the policy long enough to ascer in its contents and retained it several months before alleging any mistake in its reduction to writing."

Another case which will emphasize what we have said relative to the Snell case is that of Hearne v. Ins. Co. (20 Wall., 488), where a letter was written asking for insurance on a certain voyage, the company's reply somewhat varied the terms of the proposal, and a policy was made out on the same day which described the voyage in the terms of the company's reply. Thereafter it was delivered to the assured and received without objection. The court refused to reform the instrument, saying: "The correspondence between the parties constituted a preliminary agreement. The answer to Hearne's proposal was plain and explicit. It admitted of but one construction. He was bound carefully to read it, and it is to be presumed he did so. In that event there was as little room for misapprehension on his part as on the part of the company * * * The inference of full and correct knowledge is inevitable." If the written instrument which was transmitted to claimant's decedent be treated

as the proposal of a contract by the Bureau of Supplies and Accounts, his signing and keeping a copy of it without complaint for several months produces an analogy to the last case mentioned which is apparent. (See also Williams v. Hamilton, 104 Iowa, 423, 34 Cyc., 949). He was not authorized to rely upon the Gov-
42 ernment official with whom he negotiated to reduce the contract to writing. (St. Louis Hay & Grain Co. case, supra.) He was under a duty to himself to see that the contract correctly expressed his intentions, and as the statute so exactingly requires contracts to be in writing and signed by the contracting parties he may have been under a legal duty to examine the contract; but whether he was under a legal duty or not, he ought to bear the consequences of his own neglect. (St. Louis Hay Co. case, 37 C. of Cl., 281; 191 U. S., 159.)

But the claimant further insists that the doctrine of reformation is a "broad, equitable doctrine" which "should be treated from a broad, equitable standpoint." The power to reform an instrument is broad in the sense of being an extraordinary power which, like that of cancellation, ought not to be exercised except in a clear case. (Atlantic Delaine Co. v. James, 94 U. S., 207.) It grants the relief, upon well-defined principles, when a mutual mistake is shown, according to the rules of evidence which it adopts. It does not encourage mistakes by making it easy to correct them, and it admonishes all to use, at the least, ordinary care to ascertain the contents of the contracts which they sign. (St. Louis Hay & Grain Co. case, supra.) It follows that we can not reform the instrument referred to, and must deny the relief prayed.

The petition as to that portion seeking reformation is dismissed; and we proceed to consider the questions presented under the contract without reformation.

The delivery in this case was to be "alongside" the wharf or alongside the lighter. In Turnbull v. Citizens' Bank (16 Fed., 145), the contract was that the consignees should take the iron "from alongside," and it was held "that undoubtedly and plainly means that they were to take it from where the ordinary appliances of the ship would leave it in discharging—'at the end of the ship's tackle'—on the wharf, if the ship was discharging at a wharf; on a lighter, if the ship could not reach a wharf and was discharging in a stream." And in Seagar v. N. Y. & C. Mail S. S. Co. (55 Fed., 324) (S. C., 55 Fed., 880). "The object of the provision for 'delivery alongside and within reach of the ship's tackles' is to secure a certain convenience to the ship by not requiring her to carry the goods for deposit beyond a certain easily determinable limit of space."

And the general rule is that the delivery of goods at the port of destination is governed by the usages of trade and that a custom at a port of delivery may become part of the contract. (Richardson v. Goddard, 23 How., 28; Blossom v. Smith, 3 Blatchf., 316; Higgins v. U. S. Mail S. S. Co., 3 Blatchf., 282.)

But this general rule does not obtain where there is an express contract between the parties regulating delivery or defining the rights and liabilities of the parties.

Evidence of usage is "admissible in certain cases for the purpose of annexing incidents to the contract in matters upon which the contract is silent, but it is never admitted to make a contract or to add a new element to the terms of a contract previously made by the parties." (The Delaware, 14 Wall., 579, 603.)

When the language of the contract is ambiguous, parol evidence of usage is generally admissible to enable the court to arrive at the real intention of the parties, but it is not admissible to vary,
43 contradict, or defeat express stipulations or provisions restricting or enlarging the customary right. (Hart v. Shaw, 1 Cliff., 358, 366; The Gazelle, 128 U. S., 474, 486.)

The delivery of the cargoes according to the terms of the contract before us were to be "alongside" the wharf or alongside a lighter, and there is no question raised that the cargoes were delivered in good condition at the place mentioned while yet in the vessels; but the defendants urge that the delivery was not completed by bringing the vessel containing the cargo alongside a lighter or the wharf, and that there was a duty on the carrier to complete delivery by bringing the coal to "the rail of the ship." The claimant, on the other hand, insists that there was no further duty in the matter of delivery imposed by the contract than to bring the cargo alongside the lighter or wharf and that the discharge of the cargo is regulated by other and express terms of the contract. If the written agreement between the parties defines their rights and liabilities in the matter of discharging the coal, it should have a controlling effect, and if it be silent we would be disposed to hold that the custom or usage at the port of destination could be looked to in ascertaining the intention of the parties. (Authorities supra.) Delivery where the contract is otherwise silent may involve discharge, at least to an extent, but the term "discharge" imports unloading and not delivery. In the case of The Kimball (3 Wall., 37) the charter party contained a clause that the cargo should "be received and delivered within reach of the ship's tackles at the ports of lading and discharging." The place where delivery was to be had was the wharf at which the ship might be lying. The court says: "The discharge mentioned does not import a delivery of the cargo; it only imports its unloading from the ship. Such is the obvious meaning of the term and so it has been judicially held," citing Certain Logs of Mahogany (2 Sumner, 589). This last named case is referred to and followed in Sears v. Bags of Linseed (1 Cliff., 68), and the court there says: "These considerations lead necessarily to the conclusion that the word 'discharged' as used in the charter party referred to the unlading of the goods after the arrival of the vessel and not to the delivery of the consignment to the consignee." In Kilroy v. Del. & Hudson Canal Co. (121 N. Y., 22) the bill of lading specified that the coal was to be delivered "alongside," and it was held that the delivery "alongside" imposed upon the consignee the duty and expense of unloading the coal, under a prevalent custom, and it will be noted that the provision in the Turnbull case, supra, was for a taking "from alongside," which was held to mean that it should be taken from where the ship's tackle would place the cargo.

As stated, the contract here refers to delivery and to discharge—as to delivery in paragraph 8, where it is provided that each cargo is to be delivered alongside a wharf or alongside a lighter (where the carrier can safely lie afloat) "as may be directed by the commandant." But delivery and discharge are not equivalent terms. The one refers to the accomplishment of the contract of carriage, a point where its duty of carriage ends; the other refers to the removal of the cargo after it has reached the place of delivery. Under the contract the contractor's obligation of carriage continues until the cargo is safely delivered alongside the wharf or lighter, and when so safely delivered the vessel becomes subject to the commandant's orders in the matter of discharge.

44 As to discharging the coal, it is provided in paragraph 5, "the Government discharges cargo at its expense"; paragraph 7 regulates the rate of discharge as well as time of beginning of lay days; paragraph 10 speaks of discharge; and paragraph 13 stipulates that the "commandant will be instructed to discharge as expeditiously as practicable," while paragraph 4 requires the ship to report to the commandant upon its arrival at Cavite "and be subject to his orders in the matter of discharge."

In the construction of a contract and of different terms in it the court should look to the entire contract and not merely at detached portions to ascertain its meaning and the intention of the parties. (Boardman v. Lessees, 6 Pet., 328; Bailey v. Railroad, 17 Wall., 96. 9 Cyc., 579.)

It is true that words of doubtful meaning and sometimes ambiguous terms in a contract are open to explanation by parol evidence. The custom or usage of trade is "often employed to explain words or phrases in a contract of doubtful signification or which may be understood in different senses according to the subject matter to which they are applied. But if it be inconsistent with the contract or expressly, or by necessary implication, contradicts it, it can not be received in evidence to affect it." (Barnard v. Kellogg, 10 Wall., 383.)

"The effect of usage upon the contracts of parties has been decided many times. It may be resorted to in order to make definite what is uncertain, clear up what is doubtful, or annex incidents, but not to vary or contradict the terms of a contract." (Moore's case, 196 U. S., 157.)

Discharging the coal means unloading it, but defendants insist (and it may be conceded that it is proven that the custom or usage at said port was for the ship in discharging to deliver the coal at the rail of the ship or where its tackles would reach) that the discharge was to be by the joint act of the parties and that the terms of the contract should be construed with reference to that custom or usage. If the contract were less definite or silent in that regard, the argument would have more force, but it seems to us that the parties have made plain their meaning in the stipulations of the written instrument, and these under the authorities are controlling. In one separate paragraph of the contract it is agreed:

"All expenses of loading to be borne by the contractors; the Government discharges cargo at its expense."

Here we find the matter of loading and unloading dealt with in one paragraph which refers to nothing else, and the relative duties are placed in juxtaposition. It is manifest that the parties were considering this feature and put the result of their negotiations into writing. They could have left the matter of discharging the coal to be regulated by the custom or usage at the port of destination, but they were not bound to do so, and exercising their right in that regard, they expressed their intention in terms. Nor is this conclusion weakened by a consideration of other provisions in the contract and, as we have pointed out, all the terms must be considered together. It is provided that the ships should be subject to the orders of the commandant "in the matter of discharge," upon their arrival, the Government guaranteed "discharge" at the rate of 400 tons per day in the stream and 600 tons per day at the wharf, and further agreed to pay demurrage for detentions "caused by the Government not discharging" at said rates, and it further stipulated to instruct the commandant "to discharge the cargo as expeditiously as practicable." The use of the same term in these different parts of the one instrument tends to show that the same meaning was ascribed to it wherever used. To divide the responsibility of unloading, so that one party would lift the coal from the hold and the other would receive it at the rail, could certainly have some effect upon the ability of the Government to carry out its guaranty as to the rate of discharge as well as upon the ability of the commandant to increase that rate of discharge, for in that event the rate of discharge could be fixed by the amount of coal presented at the rail by the agents of the contractors which might be more or less than the guaranteed rate; and, to obviate this condition, we should have to import into the contract a provision that said guaranties were made, provided the amounts of 400 tons and 600 tons, respectively, were presented by the contractors at the rail. But if this view is doubtful and it can yet be said that the custom or usage may affect the terms referred to, there still remains the explicit provision above quoted from paragraph 5 of the contract.

The expense incident to taking the coal from the end of the ship's tackle would be borne in any event by the Government, even though the custom or usage were held to prevail under the provisions referred to and excluding paragraph 5, and in that view that paragraph would have no field of operation. But it is our duty to construe the entire contract, without excluding any of its terms, if possible to do so, and with reference to all and every of its provisions. (Authorities, supra.)

These considerations lead us to the conclusion on this phase of the case that the defendants were bound to bear the expense of discharging the coal, and that it could have been unloaded by the use of the ship's appliances and material with the latter's consent or by independent means adopted by the Government. As the former course was pursued, we think the claimant is entitled to be paid the reason-

able value of the materials used and the reasonable value of the use of its appliances and services of its crew.

As to demurrage: The contention between the parties as to demurrage arises from the fact that the auditor allowed the claimant demurrage based upon the idea that the ships were to be taken to the wharf, or discharged in the stream, at 600 tons per day when they had lightened to 20 feet; and until so lightened the contract rate of 400 tons in the stream should prevail.

The guaranty of the Government was "but 20 feet of water at the coaling wharf, Langley Point," and the claimant calling attention to the seventh paragraph that the discharge should be "at the rate of 400 tons per day for such part of cargo as may be necessary to discharge in the bay to enable a vessel of deep draft to go to the wharf and 600 tons per day at wharf," and also to paragraph 13 guaranteeing an average daily discharge of 400 tons in the stream and 600 tons at the wharf, and stipulating that the commandant would be instructed "to discharge as expeditiously as practicable, with a view of exceeding those rates," argues, hence, that the intent and meaning of the contract is that the ship would be taken to the wharf
46 for discharge as soon as she was lightened sufficiently to "enable a vessel of deep draft to go to the wharf," and, therefore, that the 20-foot depth guaranteed was not the limit of depth intended if in fact there was a greater depth. The difference in discharging at one or the other rate, in the stream or at the wharf, is apparent, because the ship would save a day in three if the rate was 600 instead of 400 tons.

The defendants insist that as the Government guaranteed 20 feet of water the commandant was not required to take any account of the depth until the ship was lightened to the 20-foot draft; and they insist that when "the Government guarantees but 20 feet of water" that determines the question as to when the change in the rate of discharge would be operative. As pointed out above in this opinion, every part of the contract must be looked to and given, if possible, some meaning. But in the view we take it is unnecessary to determine this question, because if it were conceded that claimant's contention as to the meaning of the contract is correct there would yet be a fatal objection to applying it. The burden of proving that there was a greater depth is upon the claimant, as he predicates a claim upon the allegation that a large part of the coal should have been discharged at the rate of 600 tons when it was discharged at 400 tons per day. The proof relied on is the statement that the Croydon, "although drawing 22 feet 6 inches, was taken to the plant to facilitate her discharge," and claimant insists that as one vessel was taken to the plant when drawing 22 feet 6 inches, therefore other vessels should have been taken to the wharf when lightened to that draft. We may add in this connection that claimant insists that another vessel, the Selsdon, was taken to the wharf drawing approximately 21 feet 6 inches. The Croydon was taken to the wharf and the work of unloading her was begun June 22, and the Selsdon was discharged June 24.

The period during which the eight vessels were at said port and

discharging ranged from May 23, when the first of them arrived at Cavite (the Knight of St. George), and September 28, when the Needles arrived there. Seven of the vessels, however, arrived or were discharged in the months of May, June, and July. The Croydon was discharged on July 3, but it does not definitely appear on what day she was taken to "the plant."

The question, then, is presented as to whether the evidence is sufficient to show that there was as to the other vessels which were not taken to the wharf 22 feet 6 inches of water or, to state it broader, whether the evidence is sufficient to justify a conclusion that there was more than 20 feet of water. As stated, the claimant has the burden of proving this fact. There is a presumption, which is frequently indulged, that where a condition or status of a continuous nature is shown to exist at a definite time it may be inferred to exist at a subsequent time. (16 Cyc., 1052.) But the inference thus drawn presupposes that the fact relied upon is one that has the quality of being continuous. (1 Greenl. Ev., sec. 41.) In the case before us we are asked to apply the rule to the depth of water at a wharf. No proof is made of the tide, its ebb or flow or variableness. We know that the depth at a wharf may be affected by tide. We are not informed of the tidal condition when either of said vessels went to the wharf, and diligent counsel has not informed us, nor have we been able to find, where any court has applied the presumption mentioned to a condition as variable as the tides. The actual condition was as susceptible of ascertainment by the ship's agents as by the Government agents. And as the proof is not made, except as stated, we do not feel authorized to find that the requisite fact is shown by the evidence, and therefore we should decline to disturb the conclusions of the auditor in the question of the depth upon which the rate of discharge should be based.

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3. Another item of demurrage is based upon the contention that a donkey engine, belonging to the Knight of St. George and being used by defendants in discharging that ship's cargo, blew out, entailing a delay of 19½ hours, and demurrage is claimed for this detention. The argument is that as the defendants could have used other means than the ship's appliances in discharging, they should, upon the breaking down of the engine, have secured other means, and failure to continue prompt discharge was a fault of defendants for which they should pay. We do not assent to this contention. Under the views above stated the defendants were bound to discharge at their expense and were free to use, certainly with the consent of the ship's agents, its appliances, paying therefor reasonable compensation. As we view the situation the use of the engine was a bailment for the mutual benefit of the parties, the one to get the use and the other compensation, and in such case the owner and bailor impliedly represents that the property to be used by the bailee is reasonably suited to the contemplated use. (Bass v. Cantor, 123 Ind., 444.) If it break down when it is being properly used, the bailee is not chargeable with fault, but the bailor may be chargeable. (5 Cyc., 179.) There is nothing to show any improper use of the engine by defendants' agents, and it is therefore inferable that it broke from

inherent defects, and as a consequence defendants are not responsible for it nor for the delay caused thereby.

4. The claimant seeks to recover back the port charges levied by the customs authorities of the Philippine Islands for which he says he was not liable under the terms of his contract with the Government. Each of the vessels was required to pay tonnage dues and other similar charges. The claim of exemption from these is based upon the act of March 3, 1905 (33 Stat. L., 928), which provides tonnage dues at ports in said islands and declares:

"SEC. 15. That the following shall be exempt from tonnage dues: A vessel belonging to or employed in the service of the Government of the United States."

It is insisted by claimant that these vessels were "employed in the service" of the United States.

The contractor, claimant here, secured the vessels to transport the coal which he agreed to deliver at Manila Bay for the Government. Each ship was to be consigned to the contractor at the port designated by the Bureau of Equipment. When loaded it should sail immediately and directly for Cavite, and on arrival there report to the commandant. Each cargo was to be delivered along-side a wharf or alongside a lighter, and the vessels could go either by way of Cape of Good Hope or the Suez Canal, "at the option of the owners." Each was manned by master and crew in the employ of the owner, and the United States exercised no control over them. We think the contract was one of affreightment. (Shaw v. United
48 States, 93 U. S., 235.) Where the general owner retains the possession, command, and navigation of the vessel and contracts to carry a cargo of freight for the voyage the charter party is a contract of affreightment, sounding in covenant. "By such a contract the charterer obtains no right of control over the vessel." (Richardson v. Windsor, 3 Cliff., 395, 399.) The section quoted refers to and is inclusive of vessels (1) belonging to or (2) employed in the service of the Government. In either case there is to be inferred an absolute control of the vessel by the Government, and the fact that it carries a cargo of freight under contract with the United States does not put the vessel in the service of the Government.

We are referred to two cases relied on to sustain the contention of claimant upon this question, (1) the Swift & Co. case (43 C. Cls., 409), where the contractor was exempted from the payment of duties on meat taken into Cuba for the subsistence of the Army. The meat was to be transported in Government transports which were, of course, in the service of the Government, and, the supply of contract beef for the Army's use having failed, the contractor furnished meat from the stock of beef on hand which he had previously shipped for sale to the citizens of Santiago and upon which duty had been paid. When that beef was furnished, accepted, and used to supply the Army, under the terms of the contract, the court held that the contractor was entitled to be repaid the duties he had paid upon it, because by the terms of the contract the beef to be furnished was exempted from duties. That case has no application here. (2) The Morris case (14 Pet., 464), also relied on, involved the construc-

tion of an act making it unlawful for a citizen of the United States to serve on board any vessel of the United States "employed, or made use of, in the transportation" of slaves, and it was held that under the facts of that case the vessel was "employed" in the slave trade, though it was bound on its outward voyage and was not, at the time, transporting slaves. "To be 'employed,' in anything," says the court, "means not only the act of doing it, but also to be engaged to do it." But the act before us does not involve the question of whether the ships exempted from tonnage duties are employed by the United States, for to come within the exemption they must either belong to or be employed in the service of the United States. "In the service" here does not mean "serving," because a vessel may be in the service and be not doing any service, as was clearly pointed out by Chief Justice Nott in the Aulick case (27 C. Cls., 109), where he says: "There is a distinction between rendering service and being in service * * *. A ship of war may pass her entire life in a condition of readiness to serve, but of never serving." In other words, she is in the service though not rendering service. And so a retired Army officer may still be in the service. (105 U. S., 244.) As the act includes the vessels belonging to as well as those in the service of the Government, it is evident that its application is not based on ownership of the vessel merely but on control as well. And we can not see how a vessel can be "in the service of the Government" when the Government has no control of the vessel itself or its management. Besides this, it would appear incongruous to hold that the Government should pay for the use of the machinery and appliances of a ship, as we have held in this case, or to hold that it should pay
49 demurrage, as we are asked to do here, if the ship were "in the service of the Government." Our conclusion is that the vessels in question are not brought within the terms of section 15 of the said act.

Part of the petition having been dismissed as to the reformation of the contract, judgment is now ordered entered in favor of the claimant in the sum of $1,607.57 on Findings V and VII.

Barney, J., dissents from the judgment on the ground that in his opinion the contract should be reformed.

50 VI. *Judgment of the Court.*

No. 29161.

CARL U. ACKERLIND, Administrator of Erik G. Lind, Deceased,
v.
THE UNITED STATES.

At a Court of Claims held in the city of Washington on the 23d day of November, 1914, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find in favor of the claimant, and do order, adjudge and decree that the claimant, Carl U. Ackerlind, Administrator of Erik G. Lind, deceased, do

have and recover of and from the United States the sum of one thousand six hundred seven dollars and fifty-seven cents ($1,607.57), and that the petition be otherwise dismissed.

BY THE COURT.

51 VII. *Stipulation as to Record.*

In the Court of Claims.

No. 29161.

CARL U. ACKERLIND, Administrator of Erik G. Lind, Deceased,
v.
THE UNITED STATES.

Stipulation.

It is hereby stipulated and agreed that the record in the foregoing cause to be taken to the Supreme Court on appeal shall consist of the pleadings, substitution of administrator, the findings of fact, opinion and judgment, as required by the rules of the Supreme Court and, in addition thereto, of the statement made by the Court of Claims following its conclusion of law and preceding its opinion, the same being accepted by the parties as embodying all the evidence necessary for the consideration of the Supreme Court upon the question of the reformation of the contract and as a
52 finding of the facts equally with the findings of fact preceding it.

It is also agreed that Exhibit A to the claimant's petition, being the contract dated March 2, 1905, need not be attached to the petition because it is set out in full in the aforesaid statement of the court.

KING & KING,
Attorneys for Claimant.
HUSTON THOMPSON,
Assistant Attorney-General.

VIII. *Application for Appeal.*

In the Court of Claims.

No. 29161.

CARL U. ACKERLIND, Administrator of Erik G. Lind, Deceased,
v.
THE UNITED STATES.

Application for Appeal.

From the judgment rendered in this case on the 23d day
53 of November, 1914, so far as it was against the claimant, the claimant, Carl U. Ackerlind, administrator of Erik G.

Lind, by his attorneys of record, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

KING & KING,
Attorneys for Claimant.

Filed in open court the 25th day of November, 1914, whereupon it was ordered that the appeal be allowed, as prayed for. By the Court.

Clerk's Certificate.

In the Court of Claims.

No. 29161.

CARL U. ACKERLIND, Administrator of Erik G. Lind, Deceased,
v.
THE UNITED STATES.

I, John Randolph, Assistant Clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause of the order substituting the administrator and reentering judgment, of the findings of fact, conclusion of law, statement, and opinion of the court, of the judgment of the court, of the stipulation as to the record, and of the application of claimant for, and the allowance of appeal to the Supreme Court of the United States.

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In testimony whereof I have hereunto set my hand and affixed the seal of the Court of Claims this 28th day of November, 1914.

[Seal Court of Claims.]

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 24,451. Court of Claims. Term No. 293. Carl U. Ackerlind, administrator of Erik G. Lind, deceased, appellant, vs. The United States. Filed November 28th, 1914. File No. 24,451.

Supreme Court of the United States

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LIST OF AUTHORITIES.

Supreme Court of the United States

October Term, 1915.

CARL U. ACKERLIND, Administrator of ERIK G. LIND, Deceased, *Appellant*,
v.
THE UNITED STATES.
} No. 293.

Appeal From the Court of Claims.

BRIEF FOR APPELLANT.

I. STATEMENT OF THE CASE.

Proceedings and Judgment.

This is a suit upon two contracts made by Erik G. Lind, since deceased, by the name of Lind & Co., for the transportation of coal from various points on the Atlantic coast of the United States to the United States naval coal depot at Sangley Point, Manila Bay, Philippine Islands. The first contract was dated March 2, 1905 (rec. pp. 16–20); the second, July 3, 1905 (pp. 6–10).

The claimant invoked the equity powers of the Court of Claims for a reformation of the first contract by the elimination of a certain clause alleged to have been introduced into the contract by mistake and contrary to

previous understanding and agreement, and asked judgment for $11,032.40 upon both contracts.

The Court of Claims refused to reform the contract as asked for under its equity powers, but gave judgment in favor of the claimant upon the contracts as they stood for the sum of $1,607.57. The opinion of the court was delivered by Chief Justice Campbell and is found at pp. 25–43 of the record, and is reported 49 C. Cls. 635. Judge Barney dissented from the judgment "on the ground that in his opinion the contract should be reformed" (rec. pp. 12, 43; 49 C. Cls. 668). From this judgment the claimant alone appealed (rec. pp. 44, 45).

The principal question on this appeal is whether the contract ought to be reformed, although there are certain items which the claimant claims should have been included in the judgment, irrespective of the question of reformation.

Mode of Finding the Facts.

The Court of Claims made formal "Findings of Fact" (rec. pp. 13–16) which covered the items claimed, apart from the proposed reformation of the contract, and also found what would be due "if the contract were reformed, as requested by claimant" (Finding X, top p. 16 of record). On the question of the requested reformation of the contract, the court made a "Statement" (beginning at middle p. 16 and going to near foot p. 25 of record). This "Statement" is in the form of a finding of fact. It is, by stipulation (rec. p. 44), "accepted by the parties as embodying all the evidence necessary for the consideration of the Supreme Court upon the question of the reformation of the contract and as a finding of the facts equally with the findings of fact preceding it."

The action of the court, as well as the stipulation of the parties, was based upon a doubt whether in a case of

equity jurisdiction the court had the power to find the facts, or whether all the evidence should be transmitted for the consideration of this court. This doubt has since been resolved at the present term in *Cramp* v. *United States*, 239 U. S. 221, 232,—a petition for reformation of contract,—in favor of the power and duty of the Court of Claims to make findings of fact in cases of equity jurisdiction, the same as in other cases. The action of the court below in making the "Statement" in the form of a finding of fact and the stipulation of the parties accepting it as a finding of fact in lieu of the evidence is therefore in strict conformity to what this court has now decided to be the proper course.

The Facts Found.

1. The Bureau of Equipment of the United States Navy entered into negotiations with the claimant's decedent, Erik G. Lind, for the transportation of a large quantity of coal to the Philippines. A contract was subsequently made and signed under the direction of the Bureau of Supplies and Accounts dated March 2, 1905 (rec. p. 16). This contract was based upon a requisition made by the Bureau of Equipment. The contract was made by the Bureau of Supplies and Accounts. The duties of these two bureaus are defined by Navy Regulations (pp. 24, 25) as follows:

"5. (1) The duties of the Bureau of Equipment shall comprise all that relates to the equipment of ships * * *. It shall require for all coal for steamers' and ships' use, including expenses of transportation, storage, and handling the same * * *.

"10. (1) The duties of the Bureau of Supplies and Accounts shall comprise all that relates to * * * the purchase of all supplies for the Naval Establishment,

except supplies for the Marine Corps; and the keeping of a proper system of accounts of the same.

"(5) It shall have charge of all shipments * * *."

All preliminary details, upon which contracts governing the purchase of coal and its transportation are based, are arranged by the Bureau of Equipment and all terms settled by that bureau in advance of the submission of a requisition. A requisition covering the transaction is then prepared and forwarded to the Bureau of Supplies and Accounts, upon which a formal contract is prepared and entered into by that bureau or one of its agents (Statement of Secretary of Navy, March 1, 1907, rec. near top p. 24).

The specifications sent by the Bureau of Equipment to the Bureau of Supplies and Accounts upon which a contract was to be based, all of which were embodied in the contract as signed, contained the following provisions (rec. 13, 14, 21):

"4. Each ship * * * when loaded to sail immediately and directly for Cavite; upon arrival there to report to the commandant and be subject to his orders in the matter of discharge.

"5. All expenses of loading to be borne by the contractors; the Government discharges cargo at its expense.

"6. The Government guarantees but twenty (20) feet of water at coaling wharf, Sangley Point.

"7. Cargo to be discharged at the rate of four hundred (400) tons per day for such part of cargo as may be necessary to discharge in the bay to enable a vessel of deep draft to go to the wharf, and six hundred (600) tons per day at wharf, Sundays and legal holidays excepted in each instance, or the Government pays demurrage at the rate of eight (8) cents per ton per day on the net registered tonnage of the vessel, for any detention caused by the Government (through fault of its own), not discharging at the above-named rates, it being understood that twenty-four (24) hours' notice of arrival of

each cargo under this charter shall be given to the commandant before lay days commence; and, further, that in the event of a cargo arriving before the preceding cargo is discharged, twenty-four (24) hours' notice of arrival shall be given after discharge of each cargo before lay days commence in case of that next arriving.

"8. Each cargo to be delivered in good condition alongside the wharf or alongside any vessel or lighter where the carrier can safely lie afloat, as may be directed by the commandant.

"13. While an average daily discharge of 400 tons in the stream and 600 tons at the wharf is guaranteed, the commandant will be instructed to discharge the cargo as expeditiously as practicable with a view of exceeding these rates without working overtime."

The clause sought to be eliminated from the contract in this proceeding is the concluding one of paragraph 7, *supra*: "and, further, that in the event of a cargo arriving before the preceding cargo is discharged, twenty-four (24) hours' notice of arrival shall be given after discharge of each cargo before lay days commence in case of that next arriving" (rec. p. 20).

After receipt of the foregoing requisition by the Bureau of Supplies and Accounts, Pay Director Boggs, purchasing pay officer at the New York Navy Yard, was instructed to draw a contract and to execute it on behalf of the United States, his orders emanating from the office of the Paymaster-General, who is Chief of the Bureau of Supplies and Accounts. Thereafter, Pay Director Boggs, having prepared the contract in duplicate, it was executed in the above form by the claimant's decedent and by Pay Director Boggs for the United States, and the claimant's decedent proceeded with its performance (rec. p. 22).

In May, 1905, the commander at Cavite, ascertaining that there was a difference between the terms of the requisition furnished him and the charter-parties of ships

arriving with the coal, wrote the Bureau of Equipment to that effect, and on or about June 17, 1905, said Bureau was informed of the fact that the written contract had included the said clause, and requested the Bureau of Supplies and Accounts to amend the contract by omitting said clause. This request having been submitted to the Paymaster-General, he referred the same to Pay Director Boggs, authorizing him to amend the contract by the omission of the clause in question. A cablegram was then transmitted by the Bureau of Equipment to the commander at Cavite as follows:

"Requisitions 149, 151, paragraph 6, requisitions 204, 206, paragraph 7, last clause must be stricken out, requiring twenty-four hours' notice to be given on arrival after the discharge each cargo before lay days commence in case of next ship arriving. Lay days commence twenty-four hours after arrival each ship under requisitions mentioned" (rec. p. 22).

Pay Director Boggs June 23, 1905, notified the contractor that by direction of the Bureau of Supplies and Accounts, par. 7 "is hereby amended by the omission of the last clause," quoting it (rec. pp. 22, 23).

The Chief of the Bureau of Equipment explained the insertion of this clause in the following letter written to the Comptroller of the Treasury before the bringing of any suit in this case (rec. pp. 23, 24):

"BUREAU OF EQUIPMENT,
"WASHINGTON, D. C., *Nov. 1, 1905.*

"3. The printed specifications, upon which proposals were originally requested, were drawn by the bureau and contained the unusual clause providing that each ship arriving at Cavite would be required to give the commandant 24 hours' notice of arrival after the next preceding ship. This clause, however, met with very serious objections on the part of the prospective contractors. At the time the specifications were drawn there was no par-

ticular urgency in getting coal to Manila, and it was the intention of the Bureau to make a single contract under them which would enable the contractor to arrange his own schedule of sailings to avoid the arrival of more than one ship at the same time. Between the time these specifications were originally drawn and the time the department finally authorized the bureau to conclude a contract for the transportation of coal to Cavite in foreign bottoms the stock of coal at Cavite became so reduced that there was on hand less than one month's supply for the ships on that station, and it became imperatively necessary that the greatest expedition be exercised and a stock of coal laid down at Cavite quickly, regardless of cost. This was impressed upon the contractors, and it was specifically understood and agreed that in the event of them getting ships that could report to load promptly, without regard to schedule or to anything other than to get coal to Cavite quickly, that the clause referred to in this correspondence would not be incorporated in the specifications governing the contract, but that usual bureau conditions, *i. e.*, lay days to commence 24 hours after the arrival of the ship, should govern. Through a clerical inadvertence, however, in the preparation of the requisition the objectionable clause was incorporated in the specifications, and the bureau's attention was not called to the fact until the matter was brought up by the arrival of several vessels at Cavite, and the Bureau of Supplies and Accounts was requested to make the necessary modifications, the cablegram referred to in paragraph 3 of the comptroller's letter being merely a notification of this bureau to the commandant at Cavite, who had been furnished by the bureau with a copy of the specifications governing each of the contracts, that a modification had been made for his guidance in the matter."

If the contract is reformed by the elimination of the clause above quoted which is claimed to have been contrary to the intention of the parties, the amount due upon reformation is $6,028.21, or, if the second claim now to be stated is allowed, $8,245.65 (Finding X, rec. p. 16).

2. The next item of claim arises under the following provisions of the contract (rec. p. 21):

"6. The Government guarantees but twenty (20) feet of water at coaling wharf, Sangley Point.

"7. Cargo to be discharged at the rate of four hundred (400) tons per day for such part of cargo as may be necessary to discharge in the bay to enable a vessel of deep draft to go to the wharf, and six hundred (600) tons per day at wharf, Sundays and legal holidays excepted in each instance, or the Government pays demurrage at the rate of eight (8) cents per ton per day on the net registered tonnage of the vessel, for any detention caused by the Government (through fault of its own), not discharging at the above-named rates."

The Government discharged the cargo (par. 5, rec. p. 21).

It appears that one vessel, the *Croydon*, "was taken to the wharf upon arrival, at which time she was drawing 22 feet 6 inches, and discharged 3,533 tons there" (Finding IV, p. 14).

Appellant claims that this shows a depth of twenty-two feet six inches at the wharf and that, although the Government guaranteed but twenty feet of water there, it was bound to discharge at the rate of six hundred tons a day, after the discharge of such part of the cargo as would "enable a vessel of deep draft to go to the wharf." Consequently demurrage must be paid for all time of discharge after a draft of twenty-two feet six inches was reached.

The amount here involved, if the contract is not reformed, is $1,128.81 (Finding VI, rec. p. 15), or if it is reformed, an additional amount of $2,217.44 (Finding X, rec. p. 16).

3. The last item is based on Sec. 15 of the act of March 3, 1905 (33 Stat. 928, 976), providing tonnage dues at Philippine ports, as follows):

"Sec. 15. That the following shall be exempt from tonnage dues: A vessel belonging to or employed in the service of the Government of the United States."

Appellant claims that the vessels were "employed in the service of the Government of the United States." The vessels paid port dues of $1,377.41 (Finding VIII, rec. p. 15).

II. ASSIGNMENTS OF ERROR.

Appellant hereby assigns the following errors in the opinion and judgment of the Court of Claims:

1. In not reforming the contract as prayed.
2. In not rendering judgment for the claimant for the amount of demurrage due upon reformation of the contract as set forth in Finding X, p. 16.
3. In not rendering judgment for the claimant for demurrage on account of the Government not discharging cargo at the rate of 600 tons a day after each vessel reached a draft of twenty-two feet six inches, as set forth in Finding VI (rec. pp. 14, 15), and the additional amount due on the same cause upon reformation of the contract, as set forth in Finding X (rec. p. 16).
4. In not rendering judgment for the claimant for port charges paid upon entry as set forth in Finding VIII (rec. p. 15).

III. BRIEF OF ARGUMENT.

1. Reformation of Contract.

Grounds for Reformation.

In considering any case, the first inquiry should be What decision is in accordance with right and justice between the parties? This is particularly true in considering so broadly equitable a doctrine as that of the reformation of contracts. Then the inquiry must follow

whether any statute or other fixed rule of law requires injustice to be perpetuated in the individual case, in order to preserve the uniformity of legal administration.

It is claimed that the following clause at the conclusion of par. 7 of requisition No. 204, constituting a part of the contract of March 2, 1905, had been the subject of objection on the part of the contractor and that it had been agreed between him and the Bureau of Equipment that it should be eliminated from the contract, but that it was by mistake inserted, contrary to the intention of both parties (rec. p. 17):

"And, further, that in the event of a cargo arriving before the preceding cargo is discharged, twenty-four (24) hours' notice of arrival shall be given after discharge of each cargo before lay days commence in case of that next arriving."

Negotiations between the parties over written specifications resulted in an agreement to omit this one provision, which not only operated to the disadvantage of the contractor, but also tended to induce the contractor to cause his vessels to arrive one at a time, when it was imperatively necessary to exercise the greatest expedition and to get coal to the Philippine Islands with the utmost promptness (letter of Bureau of Equipment, November 1, 1905, middle p. 23). The contract was drawn by the officers of the Government. This provision was inserted by pure accident. It was stated by the contractor in a communication to the Department not to have been carefully read before signing and glanced over in a perfunctory manner (rec. p. 24). He evidently relied upon the integrity and regularity of official action. This he naturally supposed to be in accordance with the preliminary negotiations.

The evidence of mistake is of an unusually conclusive character. The contract is dated March 2, 1905 (rec.

foot p. 16). In May, 1905, the commandant at Cavite, ascertaining that there was a difference between the terms of the requisition furnished him and the charter-parties of ships arriving with the coal, wrote the Bureau of Equipment to that effect. June 17, 1905, the Bureau was informed of the fact that the written contract had included the clause here in question and requested the Bureau of Supplies and Accounts to amend the contract by omitting that clause. This request having been submitted to the Paymaster-General, he referred the same to Pay Director Boggs, purchasing pay officer at New York, the contracting officer, authorizing him to amend the contract by the omission of the clause in question. The Bureau of Equipment also notified the commander at Cavite by cablegram that this clause must be stricken out, requiring twenty-four hours' notice to be given on arrival after the discharge of each cargo before lay days commence in the case of the ship next arriving. He added, contrary to the terms of the clause, "Lay days commence twenty-four hours after arrival each ship under requisitions mentioned" (rec. p. 22). June 23, 1905, the Pay Director, who was the contracting officer, notified the contractor in writing that, by direction of the Bureau of Supplies and Accounts, the contract was amended by the omission of this clause (letter Pay Director Boggs, June 23, 1905, rec. pp. 22, 23).

Thus the two bureaus concerned concurred in the view that a mistake had been made in drawing the contract. Their action was taken while the contract was still in process of execution and at a time when only one of the vessels in question had discharged her cargo and half of them had still to arrive (see dates of arrival and discharge, Finding III, middle p. 14). Here was a contemporaneous construction of the transaction by the bureaus concerned at a time when the circumstances were fresh in the minds of the officers

of those bureaus and when the contract had not yet been half executed. Contemporaneous construction of this kind is always regarded as of the highest value in determining the intention of the parties (*Topliff* v. *Topliff*, 122 U. S. 121; *District of Columbia* v. *Gallaher*, 124 U. S. 505, 510). The fact that, as soon as the existence of this clause came to the knowledge of the bureaus concerned, one bureau ordered the officer who made the contract to eliminate the clause and the other bureau ordered the officer who was receiving the goods to treat the clause as not constituting a part of the contract should be conclusive of the original intent of the parties. This seems to be conceded in the opinion of the Court of Claims as regards the Bureau of Equipment. It is said (near top p. 32 of record) that "it may be considered as a realization of the fact of a mistake by the Bureau of Equipment, where it is claimed the mistake originated, but it is not and can not be taken to prove that the party who signed the contract for the United States made a mistake when he executed the identical contract which it was his intention and which he understood should be executed."

But this is to split up the United States, which is a single juridical person in the law, into a number of persons. It is to hold that the intention and knowledge of one of its agents, though fully authorized to represent it in a particular matter, can not be attributed to the United States, if other agents performing other parts in the transaction did not participate in the first agent's knowledge. Pay Director Boggs, who was the contracting officer and signed the contract (record, p. 20) was a mere ministerial officer. He is described in the opening of the contract as "the purchasing pay officer, United States Navy pay office, New York, acting under the direction of the Secretary of the Navy" (rec. near foot p. 16). As

an officer of the pay corps of the Navy his duties were performed under the direction of the Paymaster-General of the Navy, as Chief of the Bureau of Supplies and Accounts (rec. p. 22).

Functions of the Two Bureaus.

The Bureau of Equipment, through whom the preliminary negotiations were made and the one with whom the understanding was had that the clause should be eliminated, was really the responsible one in the making of the contract. The duties of the Bureau of Supplies and Accounts and its officers were little more than to carry out the agreements already made by the Bureau of Equipment. The respective functions of the bureaus are not only defined in the regulations, from which excerpts are given in the record (pp. 24, 25), but were stated by the Secretary of the Navy in an official communication to the Court of Claims as follows (near top p. 24):

"All preliminary details, upon which contracts governing the purchase of coal and its transportation are based, are arranged by the Bureau of Equipment and all terms settled by that bureau in advance of the submission of a requisition. A requisition covering the transaction is then prepared and forwarded to the Bureau of Supplies and Accounts, upon which a formal contract is prepared and entered into by that bureau or one of its agents."

By Sec. 420 of the Revised Statutes it is provided:

"* * * and all of the duties of the Bureaus shall be performed under the authority of the Secretary of the Navy, and their orders shall be considered as emanating from him, and shall have full force and effect as such."

Hence, the mistake of the Bureau of Equipment in including this clause in the contract, notwithstanding it

had been fully understood with the contractor that it should be stricken out, was a mistake of the Secretary of the Navy. The mere fact that the Paymaster-General, in ordering one of his subordinates to sign the contract and this subordinate in signing the contract, knew nothing of the action of the Chief of the Bureau of Equipment being a mistake does not prevent the mistake from being the mistake of the United States. As it was so, good faith requires that it be corrected.

Official Evidence of the Mistake.

Further proof of the mistake and just how it came to be made is afforded by the letter of the Chief of the Bureau of Equipment of November 1, 1905, to the Comptroller of the Treasury (record, pp. 23, 24). It there appears that the printed specifications drawn by the bureau contained this clause, but that it met with very serious objections on the part of the prospective contractors. At the time the specifications were drawn, there was no particular urgency in getting coal to Manila, and it was deemed desirable to avoid the arrival of more than one ship at the same time. Between the time the specifications were drawn and the time the contract was concluded, the stock of coal became so reduced that there was less than one month's supply, and it became imperatively necessary that the greatest expedition be exercised and a stock of coal laid down at Cavite quickly, regardless of cost. This was impressed upon the contractors and it was specifically understood and agreed that, in the event of their getting ships that could load promptly, without regard to schedule or to anything other than to get coal to Cavite quickly, the clause referred to in this correspondence should not be incorporated in the specifications governing the contract, but that the usual bureau condi-

tions, that is, lay days to commence twenty-four hours after the arrival of the ship, should govern. Through a clerical inadvertence, however, in the preparation of the requisition, the objectionable clause was incorporated in the specifications and the bureau's attention not called to the fact until several vessels arrived at Cavite; whereupon an attempt was made by the Bureau of Equipment, and equally so by the Bureau of Supplies and Accounts, to modify the contract by the elimination of the objectionable clause.

This letter constitutes not only admissible evidence, but evidence of the highest official character. It was written before this suit was brought in response to a request from the Comptroller of the Treasury for information in regard to alleged modifications in the contract, and within a month from the date of discharge of the last vessel (Finding III, p. 14). It stated facts peculiarly within the official knowledge of the bureau. It was consistent with, and supplementary to, the action of the two bureaus in attempting to undo their mistake in the preceding June by eliminating the objectionable clause of par. 7. It is of similar character to the letter of the Secretary of the Navy in *United States* v. *Miller*, 208 U. S. 32, 35, 36, embodied in the findings of fact of the Court of Claims, summarizing facts within the official knowledge of the Department showing the character of duties of a naval officer. See further, as to use of documents, *New York Indians* v. *United States*, 170 U. S. 1, 32; *Oakes* v. *United States*, 174 U. S. 778, 794–798. The rule of evidence in the Court of Claims admits official contemporaneous reports and communications of public officers, made in the line of their duty. "Requiring a claimant to call as witnesses the defendants' officers, to prove by them the contents of their official reports, would work a public inconvenience." *Gordon* v. *United States*, 6 C. Cls. 292, 294.

Such evidence is superior in authenticity to the oral testimony of witnesses. Its admissibility and value are recognized by Sec. 164 of the Judicial Code, re-enacting Sec. 1076, Revised Statutes, providing as to the Court of Claims:

"The said court shall have power to call upon any of the Departments for any information or papers it may deem necessary," etc.,

thus recognizing information as well as papers as a proper subject of call upon a Department. The information must be such as is within the official knowledge of the Department, as in *United States* v. *Miller*, *ante*, p. 15. (*Brannen* v. *United States*, 20 C. Cls. 219; *Robinson* v. *United States*, 50 C. Cls. 159, 164.)

This official evidence was properly treated by both parties as affording a proper foundation for the action of the court. The court says (rec. p. 27):

"We are constrained to cite these cases because in the present case no deposition of any witness is taken, and we do not wish to establish a precedent in this case different from the settled practice of the court. But as the parties have submitted the cause without objection to the form or competency of the testimony, we shall in this case proceed to consider it."

This view is repeated in the stipulation as to the record to be transmitted to this court, where the "Statement" preceding the opinion of the Court of Claims (rec. pp. 16–25) is "accepted by the parties as embodying all the evidence necessary for the consideration of the Supreme Court upon the question of the reformation of the contract and as a finding of the facts equally with the findings of fact preceding it."

Comment is made in the opinion of the Court of Claims (near foot p. 33) that the original claimant, Erik G.

Lind, was not examined as a witness. It was not necessary. The mistake was established by evidence far superior in authenticity to the testimony of the claimant or of any other witness. It was established by the contemporaneous action of both the bureaus concerned during the lifetime of the contract and by the official statement of the Bureau of Equipment of November 1, 1905, to the proper accounting officer of the Treasury to enable him to make settlements under the contract (rec. p. 23). To what avail to take testimony to support an allegation of mistake, when the mistake was freely and fully admitted as soon as called to the attention of the other party?

Rev. Stat. § 3744, Requiring Written Contract.

Reference is made in the opinion of the Court of Claims to Sec. 3744 of the Revised Statutes as standing in the way of a correction of a written contract (rec. pp. 29, 30). But there is nothing in that section which prevents the reformation of a contract where a clear mistake has been made. Indeed, the court below seems to concede as much, saying (rec. near foot p. 28): "We are not prepared to go to the extent of holding that, where a written contract is made by the officials referred to in the statute and by mutual mistake it fails to express the intention of the parties, the party injured by the mistake is without remedy."

The fallacy of any argument based upon Sec. 3744 requiring a written contract clearly appears when it is considered that the largest field of reformation of written contracts is in deeds of real property, which must everywhere be in writing (*Walden* v. *Skinner*, 101 U. S. 577). A decree of reformation results in a new written contract, which is enforced as rewritten.

That statute was not considered to stand in the way of the reformation of a government contract in *Harvey* v. *United States*, 105 U. S. 671. That contract was with the War Department, and was therefore governed by Rev. Stat. § 3744. As the written contract was shown not to conform to the intention of the parties, it was reformed and, as so reformed, enforced. It was said, p. 689:

"It is shown that the work of making and putting in the coffer-dams, and doing whatever else was necessary, in connection with them, before the laying of the masonry could be commenced, was so expensive as to make it impossible that the prices named in the bid of the appellants could have covered that expense and the laying of the masonry also."

In *Aetna Construction Co.* v. *United States*, 46 C. Cls. 113, a contract with the War Department was reformed on a cross-bill by the United States on the ground (p. 130) "that the mistake was not in the agreement between the parties, but merely in the reduction of the agreement to written form."

In *McManus* v. *Philadelphia*, 211 Pa. 394, a bidder proposed to do certain excavation at a unit price per cubic yard. His bid being accepted, a contract was offered him containing a clause "that the total amount to be paid for the work done under this contract shall not exceed" an amount stated. He executed the contract without noticing this restriction. The work actually done largely exceeded, at the unit price of the contract, the maximum amount stated. He was held entitled to a reformation of the contract by eliminating the restrictive clause and to be paid at the full unit prices of his proposal. The court said, p. 400:

"Though contracts with the city of Philadelphia must be in writing, they are subject to reformation for fraud, accident or mistake. A municipality can not profit from either of these in connection with a written contract with it. Whatever may be its rights and privileges, it does not have this advantage over an individual. Equity treats them alike."

Authorities on Reformation of Contracts.

The doctrines so well stated in the opinion of the learned court below as to the general rule governing the action of courts of equity in reformation of contracts is not contested. In *Hearne* v. *Marine Insurance Co.*, 20 Wall. 488, 490, 491, it is thus stated:

"The reformation of written contracts for fraud or mistake is an ordinary head of equity jurisdiction. The rules which govern the exercise of this power are founded in good sense and are well settled. Where the agreement as reduced to writing omits or contains terms or stipulations contrary to the common intention of the parties, the instrument will be corrected so as to make it conform to their real intent. The parties will be placed as they would have stood if the mistake had not occurred.

"The party alleging the mistake must show exactly in what it consists, and the correction that should be made. The evidence must be such as to leave no reasonable doubt upon the mind of the court as to either of these points. The mistake must be mutual and common to both parties to the instrument. It must appear that both have done what neither intended."

This case meets the test thus laid down. Here the agreement as reduced to writing contains a term contrary to the common intention of the parties. The evidence to that effect is official. It is drawn from the records of the very bureau which made the mistake. Both parties signed the contract with a clause in it which neither intended that it should contain.

After an unequivocal understanding had been reached

with the authorized officers of the Bureau of Equipment, it is not surprising that neither party should have noticed the failure to strike out the clause objected to in the printed specifications. That they intended that it should be stricken out is established. The only question is whether the parties shall be compelled to abide by a term of a contract which was objectionable from the standpoint of both, and which both had agreed should be stricken out of the contract.

Relief is not barred in such a case either by failure to read the contract (*Equitable Ins. Co.* v. *Hearne*, 20 Wall. 494, 496; *West* v. *Suda*, 69 Conn. 60, 62), or by reading it with misunderstanding of its purport (*Penfield* v. *New Rochelle*, 18 N. Y. App. Div. 83, 86, affirmed, 160 N. Y. 697). It is sufficient that the contract as written departed from the mutual intention of the parties.

In *Snell* v. *Insurance Co.* 98 U. S. 85, the court says (pp. 88, 89, 91):

"We have before us a contract from which, by mistake, material stipulations have been omitted, whereby the true intent and meaning of the parties are not fully or accurately expressed. A definite, concluded agreement as to insurance, which, in point of time, preceded the preparation and delivery of the policy, is established by legal and exact evidence, which removes all doubt as to the understanding of the parties. In the attempt to reduce the contract to writing there has been a mutual mistake, caused chiefly by that party who now seeks to limit the insurance to an interest in the property less than that agreed to be insured. The written agreement did not effect that which the parties intended. That a court of equity can afford relief in such a case, is, we think, well settled by the authorities."

(P. 91.) "A court of equity could not deny relief under such circumstances, without aiding the insurance company to obtain an unconscionable advantage, through a mistake, for which its agents were chiefly responsible."

So here, an acknowledged mistake was made by the officers of the Government who prepared the contract, in departing from the preliminary understanding as to the elimination of this term.

In *Griswold* v. *Hazard*, 141 U. S. 260, a bond given upon a writ of *ne exeat*, conditioned by its terms that the principal shall "abide by and perform the orders and decrees of the" court, was reformed, on parol testimony of contemporary conversations, into a simple bail-bond for the principal's appearance.

Other cases of reformation of contracts on parol testimony of mistake are *Walden* v. *Skinner*, 101 U. S. 577; *Thompson* v. *Phenix Insurance Co.* 136 U. S. 287.

The Mistake that of the Navy Department.

It is said (rec. p. 31) that no mistake was made by "the Bureau of Supplies and Accounts," under whose direction the contract was finally drafted, or by "the said Pay Director," who signed it, and therefore no mistake was made by the United States. But this view is the very height of technicality. Like most extremely technical positions, it is unsound under an enlightened administration of the law with a broad purpose to effect justice. The contracting party was the United States, acting through the several steps of making this contract by the Bureau of Equipment, the Paymaster-General of the Navy, and Pay Director Boggs. The first was the brain, the last the hand, of the United States.

The exact method in which the purchase and transportation of coal is arranged under Navy Regulations (quoted pp. 24, 25) is stated by the Secretary of the Navy (rec. p. 24) as follows:

"All preliminary details upon which contracts governing the purchase of coal and its transportation are based are arranged by the Bureau of Equipment and all terms

settled by that bureau in advance of the submission of a requisition. A requisition covering the transaction is then prepared and forwarded to the Bureau of Supplies and Accounts, upon which a formal contract is prepared and entered into by that bureau or one of its agents."

It was the United States who negotiated an agreement with the contractor; it was the United States who made a mistake in writing down this agreement. In each instance, the United States acted by its appropriate officers. All the officers concerned united in an effort to correct this mistake. What the statutes and regulations have joined together, the Court of Claims has tried to put asunder. The result, we submit, is not in accordance with justice. No less is it out of harmony with sound technical considerations based upon the essentials of governmental action through varied agencies. Revised Statutes, Sec. 420, declares:

"* * * all of the duties of the bureaus shall be performed under the authority of the Secretary of the Navy, and their orders shall be considered as emanating from him, and shall have full force and effect as such."

When the Chief of the Bureau of Equipment agreed with this contractor upon arrangements to purchase coal, his act was, by virtue of this statute, the act of the Secretary of the Navy. When he forgot to notify the Bureau of Supplies and Accounts to omit the clause in question, it was the mistake and omission of the Secretary of the Navy. When the Chief of the Bureau of Supplies and Accounts embodied the mistake in the drafting of the contract, it was again the Secretary of the Navy who perpetuated the error. The acts and directions of these officers can not be separated. They are all under the statute the acts of the same person, namely, the Secretary of the Navy. The statute creates an identity of official

personality in the Secretary of the Navy. This identity can not be separated by arguing that the Secretary is two different persons because he acts through two different instruments.

Summary on Question of Reformation.

Negotiations between the parties over written specifications resulted in an agreement to omit one provision objected to by the contractor and not desired by the Government. The contract was then drawn by the officers of the Government and this provision by pure accident inserted. The contract was signed either without reading at all or with merely a perfunctory glance, in reliance upon the integrity and regularity of official action. The contractor acted on the faith of this reliance. As soon as the error was discovered, the government officers acknowledged the error and used their utmost efforts to correct it. Can there be any plainer dictate of right and justice than that such a correction must be allowed? The defense of the Government in this case necessarily maintains that the Government must act unjustly, even though its executive officers wished to act justly.

The learned and painstaking opinion of the court below sets forth with much amplification and citation of many authorities the requirements for reformation of contracts. The intent of the parties must be shown to be the same when the contract was entered into; that intent must have been misapprehended in the drafting of the formal document intended to express it; the error must have existed at the time the contract was entered into, and it must be shown by clear and satisfactory evidence. This case meets every one of these requirements. The parties intended the same thing; the pro-

vision was inserted by mere accident; as soon as it was discovered the very officers of the Government who committed the error hastened to use every means in their power to correct it; the proof is clear and satisfactory and comes from the very officials who committed the mistake.

The learned opinion of the court below seems to ignore the peremptory demand of natural justice involved in this case. The doctrine of reformation of contracts is founded upon broad equitable principles of right and justice between the parties. Natural justice clearly requires the correction of this contract. To grant such a correction is in entire conformity to the principles of equity jurisprudence repeatedly applied by the courts. The technical minutiae so ably set forth in the opinion of the Court of Claims should not be allowed to stand in the way of the correction of the contract, thus putting the parties in the same situation that they intended to be placed in when they negotiated the contract. We ask this court to apply the rules of law with the purpose of righting a wrong done by mistake to this contractor. We ask this court to carry out the expressed desire of all three of the officers concerned in the mistake, to rectify it and to relieve the contractor from the wrong unintentially inflicted upon him by this action.

2. Calculation of Demurrage.

The Government (contract, par. 6, rec. p. 17) guaranteed but twenty feet of water at the wharf, but also agreed that it (par. 5) would discharge the cargo (par. 7) at 400 tons a day, so far as necessary "to enable a vessel of deep draft to go to the wharf" and at 600 tons a day

thereafter. The *Croydon* (Finding IV, p. 14) went to the wharf at twenty-two feet six inches. We think this presumptive evidence that the other vessels could have gone to the wharf at the same draft. If that be correct, the demurrage upon three of them would have been $1,128.81 additional without reformation of the contract (Finding VI, pp. 14–15) and a further sum of $2,217.44 (Finding X, p. 16), if the contract is reformed.

The court below says (rec. p. 41) that the presence of the *Croydon* at the wharf at twenty-two feet six inches, is not proof that the others could have gone there. We submit that the depth of water at the wharf is thus shown. It was the duty of the Government, the owner of the wharf and in possession of full data, to show, if it could, that some exceptional condition permitted the *Croydon* to discharge at the wharf when drawing twenty-two feet six inches, and would not permit the other vessels to discharge there at a like draft. It could not have been a difference in tides, as suggested in the opinion (rec. p. 41) because (Finding IV, p. 14) she discharged 3,533 tons there, this occupying nearly a week at 600 tons a day and extending over many tides. It could not have been a difference in seasons, as the *Croydon* (Finding III, p. 14) was in the very middle of the period of discharge of the vessels in question.

The fact found proves the depth of water at the wharf for six days over all tides and carries with it the presumption that the same depth was there immediately before and immediately after that period.

3. Port Charges.

The Philippine Tariff Act of March 3, 1905 (33 Stat. 928, 976) says:

"Sec. 15. That the following shall be exempt from tonnage dues:

"A vessel belonging to or employed in the service of the Government of the United States. * * *"

* * * * * * *

"Sec. 17. That merchandise imported, exported, or shipped in transit for the use of the Government of the United States or of that of the Philippine Islands, including coal, shall be exempt from wharf charges."

Each of these vessels was required to pay tonnage dues amounting to $1,279.54, and similar port charges amounting to $97.87, although they were employed in transporting coal for the United States under a contract containing provisions (pars. 1–5, p. 17) declaring that the coal is to go "to the U. S. naval coal depot, Sangley Point, Manila Bay, Philippine Islands" (par. 1) in steamers to "be nominated by the contractor and accepted by the Bureau" (par. 2) to be loaded on dates "acceptable to the Bureau of Equipment" (par. 3), to be consigned for loading to "the port designated by the Bureau of Equipment," to have "Government dispatch" in loading, to be subject on arrival to the orders of the commandant (par. 4), to be there discharged by the Government (par. 5), to be paid demurrage for detention by the Government (par. 7) and its route on such voyage to be fixed by a provision in the contract (par. 15, p. 18).

The court below does not deny the liability of the Government to refund such dues if the vessel were "employed" in the service of the United States.

The Philippine government is a subsidiary government agency created by acts of Congress (acts of July 1, 1902, 32 Stat. 691, and February 6, 1905, 33 Stat. 689) and under the authority and control of the United States. When the authorities in the Philippine Islands, appointed

under these acts of Congress, refused to recognize the claimant's right to free entry and exacted tonnage charges and other dues from this vessel, this was a breach of the contract on the part of the United States. It is immaterial that the officers of the United States who broke the contract were different from those officers who made it. The breach is the act of the United States because made by officers appointed by authority of a law of the United States. Such was the decision of the Court of Claims in *Swift* v. *United States*, 43 C. Cls. 409.

The disallowance is upon the ground that the vessel was not "employed in the service of the Government of the United States." That phrase is used in contrast to the preceding term, "belonging to the United States." These vessels were hired for the United States service and subjected by contract to this service. Many details of this employment and service were settled by contract. They became governmental instruments and entitled to governmental privileges.

The word "employed" in relation to the service of vessels has once been defined in this court. In *United States* v. *Morris*, 14 Pet. 464, an indictment was found under a statute declaring it unlawful to serve on any vessel "employed or made use of in the transportation or carrying of slaves." The defendant was found on a vessel sailing from Havana for the coast of Africa, having on board equipment suitable for slave transportation. The vessel had not yet transported any slave. This court, though saying that a penal statute must be construed strictly, held that this vessel was "employed" in the transportation of slaves while sailing on her outward voyage, although no slaves had yet been transported. The court said (p. 475):

"To be 'employed' in anything, means not only the

act of doing it, but also to be engaged to do it; to be under contract or orders to do it."

In an earlier case, *The Alexander*, Fed. Case No. 165, Justice Story announced the same doctrine, saying:

"* * * every vessel fitted out for the purpose of the slave trade may be truly and accurately said to be employed in that business, and carrying it on, as soon as she has sailed on the voyage."

The point of analogy between those cases and this is that the word "employed" is there declared to be applicable to a vessel engaged under contract.

The reason of the statute applies absolutely to these vessels. It would be improper that a vessel employed by the United States should be charged dues in any port controlled by the United States. It would be paying taxes to itself or to subordinate political subdivision. In the case of a vessel under contract to the United States the contract price is affected by expected port charges. It is one of the many items going to fix the sum paid by the United States. Such charges enter into the contract price indirectly, under the law of competition, to the same extent as if the contract provided for them directly.

If the Court of Claims is correct, the United States is therefore paying port charges to the Philippine authorities on all vessels carrying coal for the Government. This is the very thing which Sec. 15 of the act of March 3, 1905, was intended to prevent.

Conclusion.

It is submitted that the judgment of the Court of Claims should be reversed, the contract reformed and the existing judgment for $1,607.57 be increased as follows:

I. For demurrage upon reformation of contract (Finding X, p. 16) ($208.23 of this amount is included in the existing judgment—Finding V, p. 14, and Conclusion of Law, p. 16)	$6,028.21
II. For additional demurrage upon reformation of the contract, allowing discharge at the rate of 600 tons a day upon reaching draft of 22 feet, 6 inches (Finding VI, pp. 14, 15). (Even if the contract is not reformed, the claimant is entitled to $1,128.81 of the last-named amount upon the allowance of discharge at 600 tons a day upon reaching draft of 22 feet, 6 inches—Finding VI, pp. 14, 15.)	2,217.44
III. Use of engine and tackle, coal and other materials and services of crews (Finding VII, rec. p. 15). (Included in existing judgment and therefore not a subject of controversy.)	1,399.34
IV. Tonnage dues and other like charges (Finding VIII, rec. p. 15)	1,377.41
Total	$11,022.40

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No. 293.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

CARL U. ACKERLIND, ADMINISTRATOR OF ERIK G. LIND, DECEASED, APPELLANT,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

WASHINGTON : GOVERNMENT PRINTING OFFICE 1916

INDEX.

CITATIONS.

The material parts of the contract are as follows:

4. Each ship * * * when loaded to sail immediately and directly for Cavite; upon arrival there to report to the commandant and be subject to his orders in the matter of discharge.

5. All expenses of loading to be borne by the contractors; the Government discharges cargo at its expense.

6. The Government guarantees but twenty (20) feet of water at coaling wharf, Sangley Point.

7. Cargo to be discharged at the rate of 400 tons per day for such part of cargo as may be necessary to discharge in the bay to enable a vessel of deep draft to go to the wharf and 600 tons per day at wharf, Sundays and legal holidays excepted in each instance, or the Government pays demurrage at the rate of 8 cents per ton per day on the net registered tonnage of the vessel for any detention caused by the Government (through fault of its own) not discharging at the above-named rates, it being understood that twenty-four (24) hours' notice of arrival of each cargo under this charter shall be given the commandant before lay days commence; and, further, *that in the event of a cargo arriving before the preceding cargo is discharged, twenty-four (24) hours' notice of arrival shall be given after discharge of cargo before lay days commence in case of that next arriving.*

8. Each cargo to be delivered in good condition alongside the wharf or alongside any vessel or lighter where the carrier can safely

lie afloat, as may be directed by the commandant.

13. While an average daily discharge of 400 tons in the stream and 600 tons at the wharf is guaranteed, the commandant will be instructed to discharge the cargo as expeditiously as practicable with a view of exceeding these rates without working overtime. (Rec. 13, 14, 17.)

Appellant seeks to eliminate from the contract the concluding clause of paragraph 7. His contention is that this clause was inserted under a mutual mistake and should, therefore, be eliminated and he should be paid demurrage, to wit, the sum of $5,819.88; further, that the expressed intention of the contract supported by evidence was that all of the vessels could have gone to the wharf, because there was a customary depth of at least 22 feet 6 inches, rather than a depth of 20 feet of water, as guaranteed by the Government, and if all the vessels could have unloaded at the wharf 600 tons a day could have been delivered instead of 400 in the bay, thus saving demurrage amounting to $2,217.44, for which recovery should be had; that appellant is also entitled to the sum of $1,377.41 expended for tonnage dues on the theory that the said vessels were employed in the service of the Government of the United States and therefore came within sections 15 and 17 of the Philippine tariff act of March 3, 1905 (33 Stat. 928, 976), exempting them from tonnage dues.

The Government maintains that the written contract, clear, and unambiguous on its face, merged

all previous verbal understandings and is therefore conclusive upon the parties; that section 3744, Revised Statutes, requires Government contracts to be in writing and signed by the contracting parties and that to eliminate the clause now objected to would rewrite the contract and conflict with the statute; that there was no mutual mistake for the reason that the official authorized to execute did so understanding that the said clause should be incorporated, and appellant, by signing, either accepted the said clause, or by his laches estopped himself from objecting thereto; that the claim for a recovery on the theory that the boats could and should have delivered their cargoes at the wharves when drawing 22 feet 6 inches of water is not tenable for the reason that appellant failed to prove that there was a greater constant depth than that guaranteed by the Government; that the said port charges in the form of tonnage dues can not be recovered as the Government had no control of the vessels or their management.

BRIEF OF ARGUMENT.

First. The contract should not be re-formed as the alleged oral agreement was merged in the written instrument.

Second. The re-formation desired would make a different contract from the one executed and hence is contrary to section 3744, Revised Statutes.

Third. The mistake, if any, lacks mutuality and for this reason the contract should not be re-formed.

Fourth. The Government is not chargeable with demurrage because it guaranteed only 20 feet of water at the wharf.

Fifth. The vessels employed, being in the service of appellant, were not exempt from tonnage dues.

FIRST.

The contract should not be re-formed as the alleged oral agreement was merged in the written instrument.

Counsel for the Government does not yield to opposing counsel in his sympathy for appellant. It is freely admitted that this is a case where an unusual hardship has been suffered, but the fact that the situation imposes a hardship does not make the United States legally responsible.

Dermott v. *Jones*, 2 Wall. 1, 7.

New Orleans-Belise, R. M., et al. v. *United States*, 239 U. S. 202.

Appellant contends that he had an oral understanding with the Bureau of Equipment that the following part of paragraph 7 of the contract was to be left out:

> * * * and further that in the event of a cargo arriving before the preceding cargo is discharged, twenty-four (24) hours' notice of arrival shall be given after discharge of each cargo before lay days commence in case of that next arriving.

That owing to a mistake the requisition drafted by that bureau and forwarded to the Chief of the Bureau of Supplies and Accounts contained this

objectionable clause; that the insertion of the clause by Pay Director Boggs, the purchasing agent, who was assigned the duty of drafting and executing the contract for the Government, was a mistake, which should excuse appellant from its binding effect because, when he signed the contract he only "glanced over the papers in a perfunctory manner, not feeling the necessity of reading them over carefully," and believed that the clause was excluded, and had he noticed its presence he would not have signed the papers. (Rec. 24.)

The facts are, however, that Pay Director Boggs was the duly authorized official in charge of the preparation and execution of the contract. (Rec. 22.) It is not shown that he understood that the clause was to be excluded. The presumption is that he knew what he was preparing and fully understood what he was signing. Furthermore, appellant was presumed to know what was in the contract when he signed it, and the fact that he made no objection then now estops him from asserting any mistake. Whatever views he may have had before the signing were merged in the executed contract. All preliminary negotiations and agreements, unless a clear mistake be established, are merged in the signed instrument. (*Insurance Co.* v. *Mowry*, 96 U. S. 544, 546.)

SECOND.

The re-formation desired would make a different contract from the one executed, and hence is contrary 3714, R. S.

The Government is exceedingly jealous of the manner in which its contracts shall be executed. It must be in order to avoid the possibilities for fraud and mistake. To this end Congress passed an act (sec. 3744, R. S., p. 738) making it the duty of the Secretaries of War, of the Navy, and of the Interior, respectively, "to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof." (*United States* v. *N. Y. & Porto Rico S. S. Co.*, 239 U. S. 88.)

It needs no elaboration to demonstrate that the elimination of the portion of the paragraph referred to would result in the rewriting of the contract. This court has said, in substance, that a contract shall be made in writing only, and signed by the parties. (*Clark* v. *U. S.*, 95 U. S. 539.)

The contract under consideration was the true and lawful expression of the parties, and to attempt to rewrite it would be in defiance of the statute, no mistake on the part of the person executing it for the Government having been shown, and appellant having waived the right to claim any mistake by signing that which was clear and unambiguous.

THIRD.

The mistake, if any, lacked mutuality and for this reason the contract should not be re-formed.

As already indicated, the Government neither concedes any mistake on the part of its officer who executed the contract nor on the part of the appellant, but the latter, in attempting to assert a mistake, comes into court guilty of laches. He was about to sign a contract involving thousands of dollars. He knew that an official in the Bureau of Supplies and Accounts, a different bureau from that with which he had conferred, was empowered to draft and execute the contract and was responsible for its contents. He knew that he received the contract from a different bureau than that which he had consulted. He says that he objected to the clause before the Bureau of Equipment, and yet when signing the contract that he "glanced over the papers in a perfunctory manner, not feeling the necessity of reading them over carefully." Neglect such as this can not be excused, even though appellant previously understood that the clause should not be in the contract. But counsel assert that as the Bureau of Equipment intended the clause to be excluded from the contract, that this intention is imputed to Pay Director Boggs, of the Bureau of Supplies and Accounts; that he should be charged with the same intention, and that as both bureaus were acting for the United States there was a mistake on the part of the Government itself in

including the said paragraph. It is not shown, however, that Pay Director Boggs knew anything of this verbal understanding. Chief Justice Campbell, in his opinion (Rec. 30), says:

> Neither the Bureau of Supplies and Accounts nor the official who prepared the contract had any knowledge of any negotiations between the Bureau of Equipment, or an agent thereof, and the claimant's decedent further than was given by the requisition.

It would have been easy enough for skillful investigators, as counsel have often shown themselves to be, to have ascertained whether Pay Director Boggs had any such understanding, yet they fail to produce the evidence. Counsel assert, however, that because long subsequent to the signing of the contract and while it was being performed the Paymaster General of the Bureau of Supplies and Accounts requested Mr. Boggs to notify appellant that the contract was to be amended by omitting the clause this showed an intention on the part of the Bureau of Supplies and Accounts which should be given a retroactive effect.

By this action there was no admission on the part of Mr. Boggs that he understood at the time of signing the contract that the said clause should be excluded. Furthermore, his acts subsequent to the signing would be ineffectual in rewriting the contract.

Section 3744, Revised Statutes, authorizes the Secretary of the Navy to designate parties who shall execute contracts, but it stops there. It does not

authorize anyone to change the terms of the contract after once executed.

Counsel would seek to avoid their dilemma by an ingenious statement (appellant's brief, p. 21), wherein they say the contracting party was the United States, acting through its several mediums in making this contract—the Bureau of Equipment, the Paymaster General of the Navy, and Pay Director Boggs. "*The first was the brain, the last the hand of the United States.*" To this transcendental suggestion might be added that behind the Bureau of Supplies and Accounts is the Secretary of the Navy, behind him the President, behind the President the intangible thing called the Government, and behind the Government the people. The people have said, through Congress, most specifically, how contracts shall be drawn for the Navy, and the Secretary of the Navy has been empowered to designate the one to draft and execute a contract. The one designated in this instance was Mr. Boggs. He has never admitted any misunderstanding of the contract he signed. If it is to be said that the Bureau of Equipment is the brain of the United States and the pay director its hand, and what one does may be fastened upon the other despite the statute, the regulations of the Navy, and the different understandings of the respective bureaus, the result would, undoubtedly, produce in many cases a condition where the bureaucratic hand, owing to a different understanding, would refuse after signing the contract to submit to the unknown reservations of the

bureaucratic head and there would then be a well-defined case of governmental locomotor ataxia.

> * * * it is fundamental that he who is without authority to bind his principal without an express contract, can not be held to have done so by implication. (*Beach* v. *United States*, 226 U. S. 243, 260.)

Counsel say (brief, p. 22): "What the statutes and regulations have joined together the Court of Claims has tried to put asunder." Whether counsel insinuates a marital relationship between the bureaus, so that the minds of the two shall now be as one even though they differed when the contract was signed, or whether they mean that the clause objected to is so wedded to the contract through the declaration of the Bureau of Equipment—one not a party to the contract—that it should not be divorced therefrom, the Government is unable to determine.

Appellant's whole argument is met with such a masterful and unanswerable statement in the decision of the Comptroller of the Treasury that the Government earnestly invites the court's attention to the pertinent part set forth.

That portion disallowing demurrage as claimed and insisting that the contract should not be re-formed, but that its obligation is binding upon claimants as executed, is as follows:

> The troublesome question in this case is as to when the time the Government had to unload the vessel commenced.

The contract provides:

"Cargo to be discharged at the rate of * * * six hundred tons per day * * * Sundays and legal holidays excepted in each instance, or the Government pays demurrage * * * for any detention caused by the Government (through fault of its own) not discharging at the above-named rates, it being understood that twenty-four (24) hours' notice of arrival of each cargo under this charter shall be given to the commandant before lay days commence; and further, that in the event of a cargo arriving before the preceding cargo is discharged, twenty-four (24) hours' notice of arrival shall be given after discharge of each cargo before lay days commence of that next arriving."

As already stated, the *Croydon* reported her arrival to the commandant, June 16, 1905, at 2 o'clock p. m. The *Croydon* was taken to the wharf, and the work of unloading her was begun June 22, 1905. The preceding cargo of the *Coronation* was not completely discharged until June 30, 1905.

It is stated by the Bureau of Equipment and by the claimants that the clause "and further, that in the event of a cargo arriving before the preceding cargo is discharged, twenty-four (24) hours' notice of arrival shall be given after discharge of each cargo before lay days commence of that next arriving," was, through a clerical inadvertance, incorporated in the requisition made by the Bureau of Equipment on the Bureau of Supplies and Accounts, and that it was understood and

agreed by the Bureau of Equipment and the claimants that said clause should not be incorporated in the specifications governing the contract, but that usual bureau conditions—i. e., lay days to commence 24 hours after the arrival of the ship should govern. That the attention of the Bureau of Equipment was not called to the fact that said clause was incorporated in the requisition and the contract until the matter was brought up by the arrival of several vessels at Cavite, when the Bureau of Supplies and Accounts was requested to modify said contract by omitting said clause therefrom.

It does not appear that the Bureau of Supplies and Accounts had any knowledge of any parol understanding and agreement between the Bureau of Equipment and the claimants that said clause should not be incorporated in the specifications in said contract until it received a communication dated June 17, 1905, from the Bureau of Equipment, requesting that said modification be made in the contract. On June 21, 1905, the Paymaster General, U. S. Navy, by indorsement referred said communication from the Bureau of Equipment to the purchasing pay officer, Navy pay office, New York, N. Y., authorizing the modification of said contract as requested by the Bureau of Euipment.

Upon the facts stated the question is presented, what effect can be given to said oral understanding and agreement made by and between the Bureau of Equipment and the claimants prior to the entering into the con-

tract in writing of March 2, 1905, supra, which was signed by the claimants and L. C. Boggs, pay director, U. S. Navy, etc., with their names at the end thereof. It does not appear that the Secretary of the Navy had any actual knowledge of said oral understanding and agreement, nor that the Bureau of Supplies and Accounts had any actual knowledge of said parol understanding and agreement until its attention was called to the matter, as already stated. It appears that said oral understanding and agreement was wholly between the claimants and the Bureau of Equipment. It does not appear that the clause in question was incorporated into the contract by the Bureau of Supplies and Accounts through any accident or mistake so far as it was concerned, or that the contract as signed by the parties with their names at the end thereof was not as the Bureau of Supplies and Accounts understood and intended it.

If the facts are as stated and understood, is it now within the power of the Bureau of Supplies and Accounts to reform the contract on the theory that the clause in question was incorporated therein by a mutual mistake and inadvertence of the parties to the contract in drawing it? The contract made by the Bureau of Supplies and Accounts was one entire transaction, and if it should be so reformed as to omit the clause in question, such reformation would involve the making of a different contract from what the Bureau of Supplies and Accounts made and intended to make with the claimants.

Section 3744 of the Revised Statutes provides:

"It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof. * * *"

The above statute establishes a system for the making, in writing, and recording, and safe disposition of contracts made in the Departments of War, of the Navy, and of the Interior.

In *Clark* v. *United States* (95 U. S. 539) it was held that an oral agreement entered into by the Quartermaster's Department with Clark for the use of a ship at so much per day was void. In that case, in construing the above statute, the court said:

"It makes it unlawful for contracting officers to make contracts in any other way than by writing, signed by the parties. This is equivalent to prohibiting any other mode of making contracts. Every man is supposed to know the law. A party who makes a contract with an officer without having it reduced to writing is knowingly accessory to a violation of duty on his part. Such a party aids in the violation of the law."

In *McCollum* v. *United States* (17 Ct. Cls. 92) it is said:

"The United States, as a body politic, act only by public officers, who are special agents

intrusted with specific, defined duties, and who can bind the Government only to the extent of the authority conferred upon them."

I do not doubt but that the Bureau of Equipment, the Bureau of Supplies and Accounts, and the contractors all acted in the utmost good faith, but when the Bureau of Equipment made the oral agreement that the clause in question should be omitted from the contract was it acting within the scope of its authority?

The Revised Statutes provide:

"SEC. 419. The business of the Department of the Navy shall be distributed in such manner as the Secretary of the Navy shall judge to be expedient and proper among the following bureaus:

"First. A Bureau of Yards and Docks.

"Second. A Bureau of Equipment and Recruiting.

"Third. A Bureau of Navigation.

"Fourth. A Bureau of Ordnance.

"Fifth. A Bureau of Construction and Repair.

"Sixth. A Bureau of Steam Engineering.

"Seventh. A Bureau of Provisions and Clothing.

"Eighth. A Bureau of Medicine and Surgery."

The act of March 2, 1889 (25 Stat. 817), provides:

"It shall be the duty of the Bureau of Provisions and Clothing to cause property accounts to be kept of all the supplies pertaining to the Naval Establishment, and to report

annually to Congress the money value of the supplies on hand at the various stations at the beginning of the fiscal year, the dispositions thereof, and of the purchases, and the expenditures of supplies for the fiscal year, and the balances remaining on hand at the end thereof."

The act of July 10, 1892 (27 Stat. 243, 245), provides:

"Bureau of Provisions and Clothing, hereafter to be called 'Bureau of Supplies and Accounts': * * * And all laws now in force relating to the Bureau of Provisions and Clothing shall now and hereafter apply to the Bureau of Supplies and Accounts."

The Navy Regulations, 1905, provides:

"ART. 10. (1) The duties of the Bureau of Supplies and Accounts shall comprise all that relates to * * * the purchase of all supplies for the Naval Establishment, except supplies for the Marine Corps; and the keeping of a proper system of accounts of the same.

"ART. 10. (5) It shall have charge of all shipments, * * *.

"ART. 10. (6) It shall estimate for and defray from its own funds the cost necessary to carry out its duties as above defined; but the cost of supplies purchased and of shipments made by this bureau for other bureaus or branches of the establishment shall be defrayed out of the proper appropriations therefor.

"ART. 1312. (1) For all materials and supplies required in the several departments of navy yards and stations, * * * requisitions shall be submitted by the respective gen-

eral storekeepers upon the Paymaster General, in the manner prescribed for open-purchase requisitions.

"ART. 1314. For services other than personal and for personal services to be procured by open contract, requisitions shall be made in the manner hereinafter prescribed for open purchases."

Under the head of "Open purchases on shore":

"ART. 1319. All purchases and payments for the same shall be made under the direction of the Paymaster General of the Navy, and orders directing such purchases shall be given only by him. When open-purchase requisitions have been approved by chiefs of bureaus, they shall be transmitted to the Paymaster General for his action.

"ART. 1320. Immediate purchase under open-purchase requisitions shall be ordered only when an exigency exists that will not permit the delay incident to advertisement and contract."

From the statutes and regulations supra, it would seem that the officers of the Bureau of Supplies and Accounts were authorized to make the contract with claimants for the transportation of said coal, but that the officers of the Bureau of Equipment were without power to make such contract.

From the authorities cited, I think it follows:

(1) That said parol agreement as a promise created no binding obligation upon the Government, because as such it was void by section 3744, Revised Statutes.

(2) It can not be used as a basis to reform the contract on the theory that the clause in question was incorporated into the contract by mutual mistake of the parties thereto, for the reason that the contract as signed by the parties was as the Bureau of Supplies and Accounts understood and intended it.

(3) The Bureau of Supplies and Accounts, upon the facts stated, are without power to modify said contract by omitting the clause in question therefrom, because the rights of the Government vested the moment the contract was executed by the parties, and, there being no fraud or mutual mistake of the parties, it is conclusively presumed to express the understanding of the parties. (11 Comp. Dec. 113.)

(4) In a communication dated January 2, 1906, addressed to this office, the claimants say—

"the proposals received from the Navy pay office and the contract were not carefully read by us before signing. At the time of signing these papers we glanced over them in a perfunctory manner, not feeling the necessity of reading them over carefully. * * * We did not know of the presence of the objectionable clause. Had we noticed its presence we would not have signed the papers * * *."

The clause in question was typewritten, in good-sized type, and the contract called for services the consideration for which amounted to $146,250. If the claimants did not read the contract it was their own fault. It ap-

pears that seven vessels were employed to transport the coal. The *Knight of St. George* arrived at Cavite May 23, 1905, the *Selsdon* May 26, 1905, the *Coronation* May 31, 1905, the *Croydon* June 16, 1905. It does not appear that any objection was raised to the contract until after the arrival of the *Croydon.* It will not do for parties to sign a contract and after it is partly executed seek to have it reformed so as to omit important provisions by saying they did not carefully read it before signing it; that they glanced over it in a perfunctory manner, not feeling the necessity of reading it carefully, and that they would not have signed it had they known of the presence of the objectionable clause. If this were permitted, contracts would not be worth the paper on which they are written. (*Upton* v. *Tribelcock*, 91 U. S. 45.)

Under this view of the case, lay days did not begin to run until after the unloading of the *Coronation* on June 30, 1905. The *Croydon* was unloaded July 3, 1905, and, as the Government had nine days and over in which to unload, there was no delay. The action of the auditor as to the item of demurrage is approved.

His action as to the other items is approved, for the reason given in my decision of December 7, 1905. (12 Comp. Dec. 350.)

A certificate of "No difference" will issue.

L. P. MITCHELL,
Assistant Comptroller.

FOURTH.

The Government is not chargeable with demurrage because it guaranteed only twenty feet of water at the wharf.

Section 6 of the contract states: "The Government guarantees but twenty (20) feet of water at coaling wharf, Sangley Point." Under section 7, 600 tons per day should be discharged at the wharf and 400 tons in the bay. Appellant docked the vessel *Croydon* drawing 22 feet 6 inches at the wharf and unloaded there. His contention is that if the *Croydon* drawing 22 feet 6 inches could dock, then the other vessels could also have docked at the same draft and there could have been 200 tons more delivered a day than was delivered while the respective boats were in the bay and thus demurrage saved to him to that extent. Counsel argue that since section 13 of the contract (Rec. 14) required the commandant to discharge the cargo as expeditiously as practicable with a view of exceeding the rates set forth in the contract without working overtime, that all the vessels could have gone to the wharf when unloaded to a point where they were not drawing over 22 feet 6 inches and discharged their cargo. In this event appellant should have received $1,128.81 demurrage without any reformation of the contract, and $2,217.44 if the contract should be reformed.

The docking of the *Croydon* at the wharf was an isolated case. It does not demonstrate that it would have been safe or practicable for the other boats to go to the wharf and unload if drawing over 20 feet.

Supposing that there was a greater depth than 20 feet, nevertheless, the naval authorities fixed the standard at which ships might lie at the wharf in safety. The court will take judicial notice of the fact that the depth of water varies daily with the tide, which in its turn varies throughout the lunar month. It is a fair presumption that the naval authorities were wise and correct in not guaranteeing a draft of more than 20 feet in which steamers might dock in safety, irrespective of the varying depths of the water.

But the burden of proof is upon appellant to show that under all conditions there was safety in more than 20 feet of water. He has failed to shift the burden in view of the unquestioned fact that the tides not only vary daily, but there is a change in depth for longer periods than a day. The question here, then, is how much must each steamer discharge to enable it to go safely to the wharf on any day of the month. This query is answered by the provision of the contract that the cargo must be discharged until her draft is lightened to 20 feet.

FIFTH.

The vessels employed being in the service of appellant were not exempt from tonnage dues.

The Philippine tariff act of March 3, 1905 (33 Stat. 928), contains the following:

> SEC. 15. That the following shall be exempt from tonnage dues: A vessel belonging to or

employed in the service of the Government of the United States. * * *

SEC. 17. That merchandise imported, exported, or shipped in transit for the use of the Government of the United States, or that of the Philippine Islands, including coal, shall be exempt from wharf charges.

Appellant contends that his boats were employed in the service of the Government of the United States; that through their employment they became governmental instruments and entitled to governmental privileges.

In the case of the *New Orleans-Belize Royal Mail et al.* v. *United States*, 239 U. S. 202, 206, this court clearly distinguished between a vessel belonging to or employed in the service of the Government of the United States and one otherwise employed, and the words of Mr. Justice Holmes are so applicable that we quote the following:

> We deem it plain that the control and navigation of the vessel remained with the general owner, although the directions in which it should proceed were determined by the United States. Authority to direct the course of a third person's servant does not prevent his remaining the servant of the third person. (*Standard Oil Co.* v. *Anderson*, 212 U. S. 215; *Little* v. *Hackett*, 116 U. S. 366; *Reybold* v. *United States*, 15 Wall. 202.) We conclude that the possession followed the navigation and control. The case resembles *Morgan* v. *United States*, 14 Wall. 531, not *United States* v. *Shea*, 152 U. S. 178, as in the latter it was found that

the vessel was under the exclusive management and control of the Quartermaster's Department. See further *Hooe* v. *Groverman*, 1 Cranch, 214, 237; *Reed* v. *United States*, 11 Wall. 591.

In the case at bar each vessel was manned by master and crew in the employ of the owner and the Government exercised no control over them.

CONCLUSION.

It is respectfully submitted that the decision of the Court of Claims should be sustained.

HUSTON THOMPSON,
Assistant Attorney General.

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if they are not controverted, and they do appear in the record, it is not necessary to send the case back for further finding.

In this case, *held* that a contract for delivery of coal should be reformed by striking out a clause in the printed form which it had been agreed should be, but by mistake of a clerk had not been, stricken out before execution.

When the Government guarantees only a certain depth of water at an unloading dock, the fact that one vessel of greater draft had unloaded at it, does not amount to proof that all vessels of that draft could do so, the Court of Claims having stated that it did not find as a fact there was generally an available depth of over twenty feet; and a claim for demurrage cannot be based on failure to unload vessels of greater draft than twenty feet of water at that dock.

The provision in the Philippine Tariff Act of March 3, 1905, c. 1408, § 15, 33 Stat. 928, 976, exempting from tonnage dues vessels belonging to, or employed in the service of, the United States, does not apply to vessels that are not under the control of the United States. *New Orleans-Belize S. S. Co.* v. *United States*, 239 U. S. 202.

The ground of such exemption being to prevent interference with agencies of the Government, it does not apply to an independent carrier who has simply contracted to deliver freight to the Government.

49 Ct. Cl. 635, reversed in part and affirmed in part.

THE facts, which involve the power of the Court of Claims to reform a contract with the United States and claims for demurrage arising under a contract for delivery of coal, are stated in the opinion.

Mr. George A. King, with whom *Mr. William B. King* was on the brief, for appellant.

Mr. Assistant Attorney General Huston Thompson for the United States:

The contract should not be reformed, as the alleged oral agreement was merged in the written instrument.

The reformation desired would make a different contract from the one executed, and hence is contrary to § 3744, Rev. Stat.

The mistake, if any, lacked mutuality, and for this reason the contract should not be reformed.

The Government is not chargeable with demurrage because it guaranteed only 20 feet of water at the wharf.

The vessels employed being in the service of the appellant were not exempt from tonnage dues. *Beach* v. *United States*, 226 U. S. 243, 260; *Clark* v. *United States*, 95 U. S. 539; *Dermott* v. *Jones*, 2 Wall. 1, 7; *Insurance Co.* v. *Mowry*, 96 U. S. 544, 546; *New Orleans S. S. Co.* v. *United States*, 239 U. S. 202; Opinion of the Comptroller of the Treasury; Philippine Tariff Act, 33 Stat. 928, 976; *United States* v. *N. Y. and Porto Rico S. S. Co.*, 239 U. S. 88.

MR. JUSTICE HOLMES delivered the opinion of the court.

The main point at issue in this case is a claim for the reformation of a contract for the transportation of coal from certain ports in the United States to Manila Bay. It is demanded by the claimant upon the following facts. The terms of such contracts are settled by the Bureau of Equipment. A requisition embodying the transaction is then sent to the Bureau of Supplies and Accounts which prepares a formal contract in writing in accordance with Rev. Stat., § 3744. This section makes it the duty of the Secretaries of War, of the Navy, and of the Interior 'to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties.' In the present case the printed specifications upon which proposals were asked contained the clause "And further that in the event of a cargo arriving before the preceding cargo is discharged, twenty-four (24) hours' notice of arrival shall be given after discharge of each cargo before lay days commence in case of that next arriving." The con-